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ATTORNEY GENERAL
No.
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IN THE SUPREME COURT OF THE UNITED STATES

ERNIE ROE, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal habeas corpus petitioner who claims he was incompetent to stand trial in state court and seeks a federal evidentiary hearing on the competency claim excused from the requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of such hearings?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ERNIE ROE, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

Petitioner, Ernie Roe, Warden, California State Prison, Lancaster, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished amended decision of the Ninth Circuit, No. 02-55143 (October 22, 2004) is contained in Appendix (App.) A at 1a-6a. The unreported order of the District Court is contained in App. B at 7a. The unreported Report and Recommendation of the Magistrate Judge is contained in App. C at 8a-28a. The unreported slip opinion of the California Court of Appeal, Fourth Appellate District, Division Two ("state appellate court"), case numbers E022512/E022548/E023541 (October 8, 1999) is contained in App. D at 29a-40a.

STATEMENT OF JURISDICTION

The amended decision of the United States Court of Appeals for the Ninth Circuit was issued on October 22, 2004. App. A at 1a. Because the amended decision "change[d] matters of substance" (*Federal Trade Commission v.*

Minneapolis-Honeywell Co., 344 U.S. 206, 211 (1952); *compare* App A *with* App. H 48a-52a), the Ninth Circuit advised the parties that judgment was entered on October 22, 2004. App. E at 41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

Section 1 of the Fourteenth Amendment states, in pertinent part, "No State . . .shall deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(a), provides in relevant part that a federal court may entertain a habeas corpus application "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(e), part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 103-132, Stat. 1214, 28 U.S.C. § 2244, et seq., provides as follows:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(iii) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Facts Relating to the Offense

In 1994, Respondent Clifton Maxwell and four other men concocted a plan to find and retake a car which had been stolen from Maxwell. Armed with guns, the men went to one location where one of them shot and wounded a man. 1 RT 169, 171-73, 185, 188; 4 RT 698-706, 712-14. Two days later they went to another location; each man took his pre-assigned place and one of them shot and killed Jerry Jefferson. 4 RT 753, 760-61, 797-98.

Maxwell initially denied any knowledge of the shootings, telling police he was a "straight A student" who does not "go around shooting people." Trial Ex. 118. Later he gave inconsistent statements during taped interviews. Trial Exs. 125, 126, 128 & 130. In each interview Maxwell was talkative, his statements were clear and coherent, and he had no problems expressing himself. He told police he was "very educated" and would not be so stupid as to shoot someone in broad daylight. He stated he was speaking to police because he thought they were "after the shooter" and he wanted to make sure police knew he was not the shooter. Trial Ex. 128.

State Trial Court Proceedings

Maxwell was convicted of first degree murder. He was tried with two of his co-defendants; two juries were empaneled in the courtroom.

Prior to trial, in May 1996, Maxwell's attorney requested a hearing to determine Maxwell's competency to stand trial under Cal. Penal Code § 1368.[1] Four psychologists found Maxwell competent to stand trial and further found he was malingering or at least grossly embellishing a psychosis. 1 RT 6. On December 16, 1996, Maxwell agreed to submit the competency question on the reports. Based on the reports, the trial court found Maxwell competent to stand trial and reinstated criminal proceedings. 1 CT 257; 1 RT 1-6.

Thereafter, Maxwell appeared at several continuance hearings; he was not disruptive. 1 CT 262. In January 1997, new counsel was appointed and requested additional time to prepare for trial because he and Maxwell were "still working on the case and still in the process of preparing for it." 1 CT 266, 268. Thereafter Maxwell was present for several additional continuance hearings; at no time did he act strangely or disrupt court proceedings. 1 CT 280, 286, 288, 291; 2 CT 304.

On January 6, 1998, the judge assigned to preside over Maxwell's trial reviewed the psychological reports and found no change in circumstances. 1 RT 6-7. In finding Maxwell competent to stand trial, the court stated:

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1. In California competency proceedings initiated under Cal. Penal Code §§ 1367 and 1368 employ the standards set forth in *Pate v. Robinson*, 383 U.S. 375 (1966). *See People v. Pennington*, 66 Cal. 2d 508, 516, 517, 426 P.2d 942, 947-948 (1967).

> [Maxwell's] behavior this afternoon indicates, to me at least, that he, again, is attempting to present a psychotic mental status or trying to in some way suggest by his behavior that he is incompetent to proceed and cannot rationally communicate with his attorney and conduct himself accordingly in this courtroom.

1 RT 7.

In January 1998, defense counsel informed the court at various times that he was concerned about Maxwell's ability to stand trial because Maxwell: (1) was deteriorating; (2) was housed in the jail's psychiatric unit and; (3) was not communicating with counsel. A sheriff's deputy also informed the court that Maxwell was the subject of numerous evaluations under Cal. Welf. & Inst. Code § 5150 and that he was refusing his antipsychotic medication. *See* 1 RT 50-59. While defense counsel stated Maxwell did not want to be present during trial and asked that Maxwell be removed from the courtroom so the jury would not see his disruptive behavior (1 RT 52-53), counsel never declared a doubt as to Maxwell's competency to stand trial. The trial court concluded Maxwell was malingering and trying to feign a psychotic mental state. 1 RT 54.

On January 13, 1998, defense counsel informed the trial court that Maxwell was on suicide watch and would not cooperate to assist counsel in preparing an opening statement. Defense counsel felt he was "betwixt and between" - counsel wanted to make an opening statement but because of how Maxwell communicated with counsel, counsel did not want to make an opening statement that might contradict Maxwell's testimony if he chose to testify. Counsel wanted to ensure the court he was not "neglecting [his] duties to [his] client." Counsel indicated he had spoken with Maxwell the previous Friday at which time he felt Maxwell "would be difficult again and probably would not change his attitude." 1 RT 73-75.

Maxwell asked his attorney to move under *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44 (1970), to be relieved; according to defense counsel, Maxwell said he did not want to come to court to make the request but wanted counsel to make the request for him. 1 RT 74. Maxwell further told defense counsel he did not want to come to court at all and if he did he would be disruptive. 1 RT 76. Counsel stated Maxwell might never want to come to court and that he believed it was in everyone's best interest not to try to forcibly bring Maxwell to court because he could put "a lot of people in danger." 1 RT 76.[2]

The trial court announced that Maxwell had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation. The bailiff had been informed that Maxwell was found holding a razor blade, was mumbling and was bleeding from the nose. The court still found Maxwell was malingering and feigning mental illness so he could present himself in the worst light possible in order to avoid trial. 1 RT 76, 78, 81. The court felt Maxwell elected not to cooperate even though he had the capacity to do so, saying, "He may feel that he is generating appellate issues which might present a better defense than an actual defense at trial to the factual charges." 1 RT 79. Counsel stated that Maxwell asked him to inform the court that he did not want to come to court, that he wanted the court to review the "1368" reports, that counsel should point out to the court that Maxwell had a history of psychiatric problems, that he wanted the court to know he was on medication in jail, and that he had received threatening letters from his co-defendant and witness, Timothy Potts. 1 RT 79. Defense counsel informed the court that Maxwell wanted an "antagonistic approach taken to Mr. Potts" which counsel

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2. In discussing the defense strategy with the court, defense counsel noted he was "walking a thin line because [he] did not want to reveal even [in] in camera proceedings any confidential communications [he] may have had or [his] client has had with [him]." 1 RT 78.

believed was counter-productive to Maxwell's theory of defense. 1 RT 80. Counsel further noted that Maxwell "clearly ask[ed him] and instruct[ed] him] to turn those letters over" even though counsel urged Maxwell not to do so. 1 RT 80. The court then found Maxwell had voluntarily absented himself from trial and, after defense counsel declined to express a doubt as to Maxwell's competency, noted it did not have a doubt as to Maxwell's competency. 1 RT 80-81.

The next day, counsel indicated that Maxwell had told him he was not willing to come to court, and that he would not behave and conform his behavior to that required in the courtroom. 2 RT 239.

The following day two psychiatrists certified Maxwell for a 14 day hold at the hospital under Cal. Welf. & Inst. Code § 5150. 2 RT 467-68; 4 RT 647-48. Fulfilling its responsibilities, the court stated:

> [S]o we have a very clear record, I do not want this record to suggest or reflect that this Court is proceeding against Mr. Maxwell when he is actually incompetent.
>
> I feel based upon the information that I have on Mr. Maxwell that he is malingering and feigning this situation to put himself in a psychiatric light which indicates his lack of competency to proceed.
>
> I think that is feigned.

2 RT 648-49. The trial court ordered Maxwell's doctor to provide a summary of his impressions of Maxwell "so we can have a clear record." 2 RT 648-649.

The next day, Maxwell appeared in court as ordered by the court. The trial court noted that for the past week, Maxwell had

been housed at the hospital security ward for his own benefit and safety. The court had a one-page faxed note from the hospital, signed by Maxwell's doctor, indicating Maxwell had been cleared to come to court for the past week. When the court asked Maxwell if he wanted to be present during trial, defense counsel stated that Maxwell told him he did not want to be present for trial. 5 RT 838-39. Maxwell stated he would not conform his behavior to that expected in the courtroom and defense counsel agreed. 5 RT 838-39.

The court stated it had no doubt that Maxwell was competent to stand trial. When the court noted that defense counsel had been in continual contact with Maxwell during trial by visiting him at the hospital jail ward, counsel acknowledged he had. The court then asked defense counsel if he was moving for a competency hearing; counsel replied he was not. When asked by the court if he was entertaining any doubt as to Maxwell's competency, counsel stated he was not. 5 RT 840.

When the court again invited Maxwell to remain for trial, Maxwell stated he was not going to sit and "let these people lie on me." 5 RT 840. The court noted that Maxwell was quietly sitting during the proceeding and asked counsel if he wanted Maxwell to remain for trial. Counsel thought Maxwell would be disruptive and should not be present for trial. 5 RT 841-42. Maxwell was not present for trial.

After the jury convicted Maxwell of first degree murder, at sentencing the trial court remarked that it was clear that Maxwell "is competent and was competent to stand trial," and that his attempt to convince the court that he was incompetent had been "totally feigned and fabricated." Sentencing RT at 20.

Post-Conviction Review Proceedings

On direct appeal and in a companion habeas petition before the California Court of Appeal, Maxwell argued the judgment

must be reversed because his Fourteenth Amendment right to due process was denied, claiming he was incompetent to stand trial and the trial court erred by not holding a second competency hearing. App. D at 30a, 32a-35a. The state appellate court affirmed the judgment, holding that under *Pate v. Robinson*, 383 U.S. 375 (1966), California Supreme Court cases citing precedents of this Court, and the evidence presented to the trial court, the trial court did not err in finding Maxwell competent to stand trial, and in not holding second competency hearing. App. D at 33a-35a. The California Supreme Court denied review of the issue. App. M at 72a.

Maxwell then filed a habeas corpus petition in federal district court. A United States Magistrate Judge reviewed Maxwell's claim that the trial court violated Maxwell's Fourteenth Amendment rights when it found Maxwell competent to stand trial and did not hold a second competency hearing. App. C at 11a. The court analyzed Maxwell's claim under AEDPA standards and denied habeas relief because Maxwell failed to demonstrate that the state appellate court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law as set forth in *Pate v. Robinson*, and *Drope v. Missouri*, 420 U.S. 162 (1975). App. C at 11a-20a. The District Court adopted the report and recommendation of the Magistrate Judge. App. B at 7a.

Maxwell appealed the district court's denial of his habeas corpus petition, again maintaining that his Fourteenth Amendment right to due process was violated when the state trial court found him competent to stand trial without holding a second competency hearing.[3] App. A at 2a. In its original

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3. In support of his appeal, Maxwell submitted to the Ninth Circuit "excerpts of record" which he had never presented to the district court, had never presented to the California Supreme Court in raising this issue in his petition for review, and most of which neither Maxwell nor his trial defense counsel had ever presented to the state trial court when it determined Maxwell was competent to stand trial. Initially, the Ninth Circuit granted

decision, without citing to AEDPA, and without even mentioning the evidentiary hearing requirements set forth in 28 U.S.C. § 2254(e)(2), the Ninth Circuit reversed and remanded for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. H at 49a-52a.

Respondent filed a petition for panel rehearing and suggestion for rehearing en banc. App. I at 53a-68a. The Ninth Circuit voted to deny the petition. App. J at 69a. Respondent filed a motion to recall and stay the mandate pending the filing of a petition for certiorari in this Court. On October 22, 2004, the Ninth Circuit granted the motion to recall the mandate and amended its decision. App. K at 70a. The amended decision again reversed and remanded for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. A at 3a. Citing *Drope v. Missouri*, 420 U.S. 162 (1975), and *Medina v. California,* 505 U.S. 437, 449 (1992), the court stated that a "trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent." App. A at 3a. Additionally, the amended decision held that a petitioner who claims he was incompetent to stand trial is excused from having to demonstrate he was not at fault in failing to develop the factual basis of his claim at trial as required under 28 U.S.C. § 2254(e)(2) to be afforded an evidentiary hearing in federal court. The court added, "A defendant who is incompetent to

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Warden Roe's motion to strike the inappropriate excerpts. App. F at 44a-45a. On reconsideration, the Ninth Circuit denied the motion to strike without prejudice to Warden Roe raising the issue in its answering brief. App. G at 46a-47a. In its answering brief, Warden Roe again requested the court disregard and strike the inappropriate excerpts as the evidence was not presented to the district court and the trial court. The Ninth Circuit never ruled on Warden Roe's requests. *See* App. A at *passim*; App. I at 66a.

stand trial is also incompetent to develop an adequate factual record or to assist his counsel in doing so." App. A at 2a-3a.

On November 4, 2004, the Ninth Circuit granted Respondent's motion to stay the mandate to January 2, 2005, pending filing of a petition for writ of certiorari in this Court. App. L at 71a.

REASONS FOR GRANTING THE WRIT

With its amended decision in this case, the Ninth Circuit has announced a categorical exception to AEDPA's evidentiary hearing requirements. According to the Ninth Circuit, under 28 U.S.C. § 2254(e)(2), a habeas applicant who alleges he was incompetent to stand trial and seeks an evidentiary hearing on the claim is excused from having to demonstrate he or his counsel could not have developed the factual basis of the claim in state court through the exercise of due diligence. App. A at 2a-3a. Certiorari is warranted because the Ninth Circuit's decision conflicts with the decisions of several other federal courts of appeals and undermines an important provision in AEDPA in an entire category of cases.

AEDPA amended prior law by authorizing federal habeas courts to hold evidentiary hearings only where the claim (1) relies on new, retroactively applicable law or new facts that "could not have been previously discovered through the exercise of due diligence," and (2) based on "the facts underlying the claim "no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A)(B). However, AEDPA imposes these requirements only where "the applicant has failed to develop the factual basis of [the] claim in State court proceedings." §2254(e)(2). In *Williams v. Taylor* 529 U.S. 362, 432 (2000), this Court held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." In this case, the Ninth Circuit held that a habeas

petitioner claiming incompetence to stand trial can *never* possess the requisite fault, thus making §2254(e)(2) altogether inapplicable to that class of claims.

The Ninth Circuit reasoned that a habeas petitioner claiming incompetence to stand trial could not have "assist[ed] his counsel," and that a defendant who cannot assist his counsel can never be at fault for the failure to develop a factual claim in state court. App. A at 2a-3a. This Court was not called upon in *Williams* to address whether a habeas applicant must be able to "assist his counsel" in developing the factual basis of a claim in state court to meet § 2254(e)(2)(A)'s requirements for an evidentiary hearing. The Ninth Circuit filled this void by creating a broad exception to AEDPA's requirements — an exception at odds with the concerns expressed by Congress and this Court to strictly limit habeas corpus evidentiary hearings. Thus, the amended decision raises a serious question which has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

The Ninth Circuit's exception to 28 U.S.C. § 2254(e)(2) also conflicts with decisions of the Fifth, Eighth, and Tenth Circuits. Sup. Ct. R. 10(a). Those circuits require a habeas applicant who claims he was incompetent to stand trial and who failed to develop the factual basis of his claim in state court to show the factual predicate for the claim could not have been previously discovered through the exercise of due diligence by the habeas applicant or his counsel, and that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense as required by 28 U.S.C. § 2254(e)(2)(A)(ii) and (B).

Like the many decisions of the Ninth Circuit which this Court has summarily reversed for disregarding AEDPA's strict limitations on collateral review of state court constitutional adjudications, the Ninth Circuit's creation of a categorical

exception to the requirements of 28 U.S.C. § 2254(e)(2) "yet again runs roughshod over the principles of comity and federalism underlying the Antiterrorism and Effective Death Penalty Act." *Kennedy v. Lockyer,* 379 F.3d 1041, 1069 (9th Cir. 2004) (O'Scannlain, J., dissenting); *see Williams v. Taylor,* 529 U.S. at 436. ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines."). Because of the Ninth Circuit's evident determination in case after case to circumvent AEDPA's strict limitations, this Court's supervisory power is again necessary to secure uniformity of decision by clarifying and "elaborat[ing] the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings." *Townsend v. Sain,* 372 U.S. 293, 310 (1963); Sup. Ct. R. 10(a).

I.

THE NINTH CIRCUIT'S HOLDING THAT A HABEAS APPLICANT WHO ALLEGES HE WAS INCOMPETENT TO STAND TRIAL IS EXCUSED FROM MEETING THE REQUIREMENTS OF 28 U.S.C. § 2254(E)(2)(A) CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

In its amended decision the Ninth Circuit reversed and remanded this case for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. A at 3a. The Ninth Circuit justified its order, not by citation to any controlling authority, but by holding that a habeas corpus applicant who claims he was incompetent to stand trial is excused from having to demonstrate he was not at fault in failing to develop the factual basis of his claim at trial under 28 U.S.C. § 2254(e)(2). This is so, held the court, because "[a] defendant who is incompetent to stand trial is also incompetent to develop an adequate factual record or to assist his counsel in doing so." App. A at 2a-3a.

Prior to the Ninth Circuit's amended decision in this case, no court had held that a habeas applicant who claims he was incompetent to stand trial in state court and seeks a federal evidentiary hearing on the competency claim is excused from the strict requirements of 28 U.S.C. § 2254(e)(2)(A). The Ninth Circuit's amended decision conflicts with the decisions of several circuits, which have required adherence to 28 U.S.C. § 2254(e)(2)(A)'s evidentiary hearing requirements when confronted with requests for evidentiary hearings on competency to stand trial claims.

For example, in *Valdez v. Ward,* 219 F.3d 1222, 1229, 1239-40 (10th Cir. 2000), the petitioner claimed his right to due

process was denied by being tried while incompetent and that the trial court should have re-evaluated his competency during trial. Prior to trial, the petitioner raised the issue of his competency to stand trial and requested a psychiatric examination. *Id.* at 1240. Two experts found the petitioner competent to stand trial. *Id.* at 1240-41. The petitioner was then tried and convicted of first degree murder and sentenced to death. *Id.* at 1227. On collateral review, the petitioner filed a habeas petition in federal district court. The district court denied the petitioner's request for an evidentiary hearing on the ground that petitioner had never requested an evidentiary hearing in state court. *Id.* The Tenth Circuit affirmed the denial of the request for an evidentiary hearing, finding that the petitioner's failure in state court to request an evidentiary hearing constituted a failure to develop the factual basis of the competency claim, thus barring an evidentiary hearing in federal court under 28 U.S.C. § 2254(e)(2). *Valdez,* 219 F.3d at 1230.

Similarly, in *Roberts v. Dretke,* 381 F.3d 491, 494 (5th Cir. 2004), the petitioner alleged the trial court erred in failing to hold a competency hearing and that trial counsel was ineffective in failing to develop evidence concerning the petitioner's mental illness or make use of his court-appointed psychiatrist. The psychiatrist's report concluded it was unnecessary to request a competency hearing. While the trial judge never saw the report, based on his own observations of the petitioner, he declined to hold a competency hearing. *Id.* at 495. The state court rejected the petitioner's claims on direct appeal and on habeas and also rejected a request for an evidentiary hearing. *Id.* at 495-96. On federal habeas, the district court refused to consider affidavits from the petitioner's family members and the petitioner's medical records. The court also denied the petitioner's request for an evidentiary hearing. *Id.* at 500. On appeal, the Fifth Circuit upheld the district court's denial of the petitioner's request for an evidentiary hearing, finding that the petitioner failed to diligently develop the factual basis of his claim in state court because he could have done so "with the resources at his

disposal." *Id.* at 500-01. *See also Koste v. Dormire,* 345 F.3d 974, 985-86 (8th Cir. 2003) (petitioner not entitled to evidentiary hearing on claim that trial counsel was ineffective in failing to request psychiatric evaluation of petitioner; any inadequacy in state court record was largely attributable to petitioner).

Similarly, cases which have affirmed the grant of an evidentiary hearing have done so *only* when the habeas applicant alleged deficiencies in defense counsel's representation in conjunction with an incompetency claim.[4] *See e.g.,*

> •*Bryan v. Mullin,* 335 F.3d 1207, 1214-15 (10th Cir. 2003) (affirming decision of district court to hold evidentiary hearing because it was necessary for district court to consider evidence of petitioner's competency to stand trial to determine validity of ineffective assistance of counsel claim; state conceded petitioner diligently sought to develop the factual basis of the ineffective assistance of counsel claim in state court, thus 28 U.S.C. § 2254(e)(2) requirements met);
>
> •*Walton v. Angelone,* 321 F.3d 442, 451-53 (4th Cir. 2003) (affirming grant of evidentiary hearing only to

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4. Maxwell has never asserted either on direct state appeal or on collateral review that trial counsel was constitutionally ineffective, thus preserving the veil of attorney-client confidentiality regarding communications he may have had with defense counsel concerning a defense strategy of incompetency to stand trial. Declining to pursue an ineffectiveness claim precludes a reviewing court from hearing relevant evidence from defense counsel who "will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California,* 505 U.S. at 450.

hear evidence relating to performance prong of the ineffective assistance of counsel claim where petitioner raised incompetency claims as well as ineffective assistance of counsel claim related to petitioner's competency to stand trial);

•*Matheney v. Anderson,* 253 F.3d 1025, 1038-39 (7th Cir. 2001)(applying requirements of § 2254(e)(2)(A) and finding petitioner's failure to develop the factual basis of his competency claim caused by trial counsel's deficient representation did not bar an evidentiary hearing with respect to ineffective assistance of counsel claim).

The circuit conflict created by the Ninth Circuit's unwarranted categorical exception to § 2254(e)(2) requires resolution by this Court. The writ of certiorari should be granted so that the ability of habeas petitioners to obtain evidentiary hearings does not depend on the circuit within which they reside. Sup. Ct. R. 10(a).

II.

THE NINTH CIRCUIT'S DECISION UNDERMINES IMPORTANT PROVISIONS OF AEDPA IN ANY CASE WHERE INCOMPETENCY TO STAND TRIAL IS CLAIMED

"The problem of the power and duty of federal judges on habeas corpus, to hold evidentiary hearings – that is, to try issues of fact anew – is a recurring one." *Townsend v. Sain,* 372 U.S. at 309. This Court has been "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor,* 529 U.S. at 436 (citing *Coleman v. Thompson,* 501 U.S. 722, 726 (1991)).

Interpreting the language of §2254(e)(2)(A), in *Williams v. Taylor*, 529 U.S. at 432, this Court held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *See also Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004). Nothing in the language of 28 U.S.C. § 2254(e)(2)(A) exempts a particular specie of claim from its purview; nor, in interpreting § 2254(e)(2), has this Court exempted particular claims from the requirements of § 2254(e)(2)(A).

In its amended decision, the Ninth Circuit adverts to this Court's decisions in *Drope v. Missouri*, 420 U.S. at 162, and *Medina v. California,* 505 U.S. at 449, noting that a "trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent." App. A at 3a. In *Drope*, this Court held that the criminal trial of an incompetent defendant violates due process . 420 U.S. at 172-73. In *Pate v. Robinson,* 383 U.S. 375, 385 (1966), the Court held that a defendant may not waive his right to have a trial court determine his competency to stand trial. The Ninth Circuit

apparently viewed that holding as necessarily meaning that a defendant also cannot "fail to develop" an incompetency claim in state court within the meaning of §2254(e)(2). That conclusion is demonstrably wrong.

Nothing in *Drope*, *Medina*, or *Pate* relieves a habeas applicant from attempting in state court to develop the factual basis of an incompetency claim in order to be afforded an evidentiary hearing in federal court. Just as a state may presume a defendant is competent and place the burden on him to prove his incompetence by a preponderance of the evidence (*Medina v. California*, 505 U.S. at 449, 451, 453), so too may Congress require a habeas applicant or his counsel to develop the factual basis of an incompetency claim in state court. Neither requirement denies a habeas applicant his right to due process or lessens the deep-rooted principle that a criminal defendant who is incompetent should not be required to stand trial. *Id.* at 447.

Requiring a habeas applicant to meet the evidentiary hearing requirements of § 2254(e)(2) respects Congress' determination through AEDPA and this Court's holdings that state court competency determinations are factual findings entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1); *Thompson v. Keohane,* 516 U.S. 99, 111 (1995); *Demosthenes v. Baal,* 495 U.S. 731, 735 (1990). "Deferring factfinding to later federal court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Kenney v. Tamayo-Reyes,* 504 U.S. 1, 9 (1992). Encouraging full factual development in state court "reduces the 'inevitable friction' that results when a federal habeas court 'overturn[s] either the factual or legal conclusions reached by the state-court system'" *Id.* at 9 (quoting *Sumner v. Mata,* 449 U.S. 539, 550 (1981)).

The Ninth Circuit's amended decision undermines those principles by diminishing the importance of state court proceedings and increasing the clashes between state and federal

courts. AEDPA, by contrast, seeks to lessen state-federal clashes by providing that "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams,* 529 U.S. at 433. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. In the context of an incompetency to stand trial claim, a habeas applicant can fulfill the requirements of § 2254(e)(2) either by attempting to present evidence of incompetency at trial, or by alleging on collateral review that defense counsel was ineffective in failing to investigate his client's competency, failing to present evidence at trial of that incompetency, failing to request a competency hearing, or failing to ensure the trial court made findings at a competency hearing. Maxwell did neither.

Under AEDPA, if a habeas applicant fails to develop the factual basis of his claim in state court and, like Maxwell (who was represented by counsel at trial, on direct appeal, and in state and federal collateral review), fails in state court to request an evidentiary hearing to develop the claim, a federal court is prohibited from holding an evidentiary hearing on the claim. 28 U.S.C. § 2254(e)(2)(A). There is no reason why a different standard should apply to a habeas applicant raising an incompetency to stand trial claim. To give effect to the presumption of correctness to be afforded state court factual findings and the evidentiary hearing requirements of AEDPA, particularly in light of the difficulties inherent in making retroactive competency determinations (*Pate,* 383 U.S. at 387), a habeas applicant should be required to fully develop the factual basis of his incompetency to stand trial claim in state court.

In reversing and remanding for a full evidentiary hearing on Maxwell's competency claim based on "both the facts in the record and the facts a 'more complete inquiry' by the trial court

could have revealed (App. A. at 3a, 7a), the Ninth Circuit relied not on AEDPA, but on its own jurisprudence, noting that "Maxwell 'was entitled to a hearing on his competency to stand trial if a reasonable judge would have . . . a "bona fide doubt" [as to] competence.'" App. A at 2a. Yet, as the district court correctly observed in denying Maxwell's habeas petition, "Federal courts assessing habeas petitions thus review the record to determine whether evidence before the state trial court raised such a 'bona fide doubt' so as to require a '*Pate* hearing.'" App. C at 16a. Such review "is not *de novo.* Relief is available only if the state adjudication (1) is contrary to, or unreasonably applied, federal law as determined by the Supreme Court, or (2) stands upon an unreasonable factual finding in light of the evidence. 28 U.S.C. § 2254(d)(1), (2)." App. C at 16a.

By its decision, the Ninth Circuit has inappropriately initiated a process of *de novo* review of the trial court's competency determination by ordering a full evidentiary hearing which, in turn, calls for a *de novo* determination of Maxwell's competency to stand trial. In so doing the Ninth Circuit: (1) afforded no deference to the decision of the California Court of Appeal under § 2254(d); disregarded numerous implied and express factual findings made by the trial court before, during and after trial concerning Maxwell's competency to stand trial, and by the state appellate court which found the trial court was not presented with evidence of changed circumstances or of incompetency to warrant a second competency hearing as required by § 2254(e)(1)(App. D at 33a-35a); (2) ignored the fact that at trial defense counsel met with Maxwell almost daily and repeatedly declined to express a doubt as to Maxwell's competency and to request a competency hearing (*see* 1 RT 54; 5 RT 840); and (3) did not consider the fact that neither in state court nor in the district court did Maxwell ever seek an evidentiary hearing on his claim, develop the factual basis of his claim as required by § 2254(e)(2), or allege that counsel was ineffective for declining to express a doubt, for not asking for a

competency hearing or for not investigating and presenting additional evidence as to Maxwell's competency. Under the rule adopted by the Ninth Circuit in this case, this will be true in virtually every case where a habeas petitioner seeks an evidentiary hearing with respect to an incompetency to stand trial claim.

This Court should not permit the Ninth Circuit to ignore the strict limitations AEDPA imposes on federal habeas review of state convictions. Each year numerous habeas applicants raise incompetency to stand trial claims. By its amended decision, the Ninth Circuit has guaranteed each of those applicants an evidentiary hearing on his claim. Given the frequency with which this issue arises, the extent to which the Ninth Circuit's decision undermines Congress's objectives in enacting § 2254(e)(2), and the conflict among the circuits on the issue, this Court should grant certiorari.

CONCLUSION

Accordingly, the State respectfully requests a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated: December 29, 2004

Respectfully submitted,

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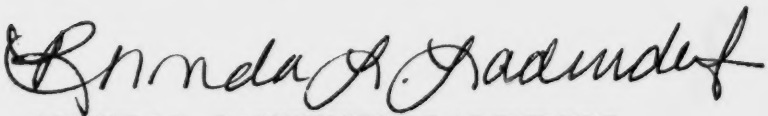

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APPENDIX A

[Filed October 22, 2004]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL, Petitioner - Appellant, **v.** **ERNIE ROE, WARDEN,** Respondent - Appellee.	No. 02-55143 D.C. No. CV-01-00131-VAP(RZ) AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted December 16, 2003
Pasadena, California

Before: HUG, B. FLETCHER, and WARDLAW, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Clifton Maxwell appeals the district court's denial of his habeas corpus petition, arguing that the trial in which a jury convicted him of first-degree murder was a violation of his Fourth and Fifth Amendment rights because he was incompetent to stand trial. Claims regarding incompetence are questions of fact, so, under the standard of review applicable to habeas petitions, Maxwell must show that the trial court's conclusion that he was competent to stand trial was an "unreasonable determination of the facts in light of the evidence presented." *Torres* v. *Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Under our jurisprudence, Maxwell "was entitled to a hearing on his competency to stand trial if a reasonable judge would have . . . a 'bona fide doubt' [as to] competence." *Id.* at 1108. Moreover, a trial court's finding of competence may be reversed as unreasonable if the fact finding procedure followed by the judge was clearly inadequate. *Id.* at 1109.

The Supreme Court recently reversed the Sixth Circuit on its holding that the defendant had been provided ineffective assistance of counsel because it relied on evidence not properly before the state court. *Holland v. Jackson*, 124 S. Ct. 2736, 2737 (2004). In this case we are not making a substantive determination on Maxwell's petition because it is unclear what evidence was properly before the state court and the consequent responsibility of the trial court in making the determination of Maxwell's competency to stand trial. The Supreme Court in *Holland* stated:

> Under the habeas statute, (the petitioner's) statement could have been the subject of an evidentiary hearing by the District Court, but only if (the petitioner) was not at fault in failing to develop that evidence in state court. . . .

Id. at 2738. In this case, a question of competence is precisely one in which the petitioner's failure to develop the facts at trial would be excused. A defendant who is

incompetent to stand trial is also incompetent to develop an adequate factual record or to assist his counsel in doing so.

We remand this case to the district court to hold a full evidentiary hearing on Maxwell's competency during the January 1998 trial, taking into account the following concerns. On remand, the district court should consider both the facts established in the record and the facts that a 'more complete inquiry' by the trial court could have revealed. *Id.* A trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent. *See Medina v. California*, 505 U.S. 437,449 (1992); *Drope v. Missouri*, 420 U.S. 162, 179 (1975); *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997). The fact that Maxwell's lawyer did not ask for an additional competency hearing may not be considered dispositive evidence of Maxwell's competency. *Odle v. Woodford*, 238 F.3d 1084, 1088-89 (9th Cir.) (noting that "counsel is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent"), *cert. denied*, 534 U.S. 888 (2001); *Miles*, 108 F.3d at 1113. Nor may his lawyer's failure to object be considered procedural default or a waiver of Maxwell's right to an additional competency hearing. *Id.*

In light of the trial court's continuing responsibility to ensure that a defendant is not tried while incompetent, we are concerned about the following facts. First, in the thirteen-month interval between the competency hearing upon which the trial court relied and the trial, Maxwell was determined numerous times to be "gravely disabled" or a danger to himself or others as a result of mental disorder.[1] Second,

---

1. California Welfare and Institutions Code § 5150 authorizes a 72-hour commitment of an inmate who, "as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled." This

Maxwell's behavior at trial was erratic and strange. And, third, during the course of trial Maxwell was involuntarily hospitalized for attempted suicide.[2] The record of what the trial court knew about the further details of Maxwell's hospitalization is unclear.

When analyzing this evidence, the district court relied on *Amaya-Ruiz v. Stewart,* 121 F.3d 486 (9th Cir. 1997), to support its finding that the evidence did not require the trial court to hold an additional competency hearing. Despite some similarities in the cases, we find the differences more persuasive.

Most important, the time between Amaya-Ruiz's criminal action and his conviction was not more than nine months. His pre-trial competency hearing, then, could not have pre-dated the trial by more than a few months. With so short a time period, the trial court could reasonably rely on the competency determination that indicated that Amaya-Ruiz was probably malingering. In Maxwell's case, however, justice was not so swift. More than a year elapsed between Maxwell's competency determination and his trial. The competency determination was itself based on medical reports that were a few months old. After so much time had passed, the trial court would have been unreasonable in relying solely on a stale competency determination in the face of contradictory evidence. See *deKaplany v. Enomoto*, 540 F.2d 975, 980-81 (9th Cir. 1976) (en banc) (stating that once there is substantial new evidence of incompetency, a bona fide

---

section was invoked against Maxwell numerous times during his pre-trial detention.

2. The State's petition for rehearing contends that the disposition relies on disputed portions of the record. However, the facts recited in this disposition come only from non-disputed portions of the record.

doubt is raised that cannot be dispelled by resort to pre-existing conflicting evidence). This court has repeatedly acknowledged the dramatic changes that can take place in a defendant's mental state in even a short period of time. *See Miles*, 108 F.3d at 1111 (change in competency within one month); *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) (noting that old psychiatric reports may lose their probative value over time, especially if subsequent facts and circumstances contradict their conclusions).

In addition to the benefit of two current competency evaluations, the trial court in *Amaya-Ruiz* was presented with significantly less evidence of incompetence than was before the court in this case. Amaya-Ruiz's behavior was consistent with a strategy of noncooperation.[3] If the facts alleged in this appeal are correct, Maxwell's case is materially different from *Amaya-Ruiz*. During the year preceding trial, Maxwell's behavior was erratic whether he was in court or in jail. He was unable to control himself in pretrial proceedings and was involuntarily committed several times while in jail awaiting trial, and once during trial. Because he repeatedly waived his right to be present at trial, the jury that convicted Maxwell never actually saw him. Maxwell's sustained erratic behavior, in light of the long interval between his competency evaluations and his trial, presents a much more compelling

---

3. There was evidence presented on appeal that Amaya-Ruiz had been treated by the jail psychiatrist, had been medicated with psychotropic drugs, had acted irrationally in jail, and had attempted suicide on an occasion other than the one described in the record before the trial court. *Amaya-Ruiz*, 121 F.3d at 493. It is clear, however, that this evidence was not presented to the state court during trial in *Amaya Ruiz*. 121 F.3d at 493. By contrast, in this case, it is unclear what evidence was before the state court at the time of trial.

argument for incompetency than did Amaya-Ruiz's behavior during his trial.

Since we do not know how much of this evidence was available to the trial court at the time of Maxwell's trial, we remand to the district court to hold an evidentiary hearing to consider the reasonableness of the trial court's determination that Maxwell was competent to stand trial.

REVERSED AND REMANDED.

APPENDIX B

[Filed Oct. 28, 2001]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON MAXWELL, Petitioner, **vs.** **ERNIE ROE, Warden,** Respondent.	Case No. EDCV01-0131-VAP(RZ) **JUDGMENT**

This matter came before the Court on the Petition of CLIFTON MAXWELL for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: November 26, 2001

/S/

VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed Oct. 22, 2001]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON MAXWELL, Petitioner, **vs.** **ERNIE ROE, Warden,** Respondent.	Case No. EDCV01-0131-VAP(RZ) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Virginia A. Phillips, United States District Judge. The undersigned recommends that the Court deny the Petition and dismiss the action with prejudice.

I.

PROCEEDINGS

On January 30, 1998, in a joint trial in Riverside County Superior Court involving three defendants and two juries, the jury assigned to Petitioner Clifton Maxwell convicted him of first degree murder (CAL. PENAL CODE § 187(a)). Reporter's Transcript ("RT") 1697; Clerk's Transcript ("CT") 954, 963. Petitioner received a prison sentence of twenty-five years to life. CT 996.

Petitioner appealed. He claimed that the trial court erred in (1) finding him mentally competent to stand trial without holding a second competency hearing; (2) requiring him to wear an electric-shock belt as a condition of his being present at trial after repeated prior disruptions of courtroom proceedings; (3) ordering that Petitioner be medicated involuntarily, without first conducting a hearing on the matter. Lodgment 9 (Opening Brief on appeal). Before receiving a ruling, he petitioned the same court for a writ of habeas corpus, asserting the second and third claims contained in his appeal. The California Court of Appeal affirmed on October 8, 1999 in an unpublished opinion that also denied the habeas petition. Lodgment 1. The same appellate court denied another petition for habeas relief on December 14, 1999. Lodgments 7 & 8. The California Supreme Court denied direct review on January 19, 2000 without comment. Finally, Petitioner sought habeas relief in the state Supreme Court, adding a fourth claim similar to his other claims: that the trial court's finding that he had voluntarily absented himself from trial proceedings was error, because (he asserts) it was also error to condition his presence on wearing the electric shock belt and because he was involuntarily medicated at the time. That court denied his petition without comment on July 26, 2000. Lodgments 2, 4, 5 & 6.

In the instant petition, filed on February 20, 2001, Petitioner raises the same claims he presented in California's courts.

II.

FACTUAL SUMMARY

In affirming Petitioner's conviction, the California Court of Appeal made certain factual findings regarding the circumstances underlying Petitioner's conviction. Lodgement 1 at 2-4. Petitioner has failed to rebut these findings with clear and convincing evidence. The findings therefore are presumed to be correct. 28 U.S.C. § 2254(e)(l); *Bragg v. Galaza,* 242 F.3d 1082, 1087 (9th Cir. 2001) (presumption applies to findings of state appellate courts as well as trial courts). These findings are summarized as follows:

> On December 27, 1994, defendant Maxwell learned that his car, a white Chevrolet Monte Carlo, was missing from his stepfather's garage, where the car had been parked.
>
> In a first attempt to recover the car, defendant Maxwell, Timothy Potts (Potts), and two others went armed to Eugene Miller Bender's house, in the belief that the car was located there. The car was not there, but some gunfire occurred, and a man named David Jackson (Jackson) was shot but not killed.
>
> Next, on December 29, 1994, Maxwell called Potts and said he had found the car. He asked Potts to obtain a tow truck. Then five men - including defendants Maxwell, Moore and Mark Camilloe Baker (Baker), Basil Chad Maxwell (Basil), and Potts - drove in two vehicles to the residence of Jerry Jefferson (Jefferson). Potts, Moore and Baker were armed.
>
> Jefferson came out of the house to meet Potts. Jefferson was cooperative and did not object to the

> car being taken. Nevertheless, Moore hit him with a rifle barrel and two shots were fired at Jefferson as he ran toward the house. Potts found the missing car, without wheels, in the garage. Potts heard more shots from the house, where he saw Moore and Baker shooting at something Potts could not see. Finally, Potts left the scene with the others.
>
> Baker testified that he saw Moore and Jefferson wrestling over a shotgun and then heard a shot.
>
> Jefferson was found dead in his bedroom. He had been shot four times, twice each from two weapons of different calibers.

Lodgment 1 at 3-4.

III.

COMPETENCE TO STAND TRIAL

The procedural history underlying Petitioner's competence claim – specifically, that the trial court erred in finding him mentally competent to stand trial and that it should have held a second competence hearing, *see* Petition at 7 – relates closely to his other claims, and the Court thus considers it first. The state courts rejected it on its merits. It is unconvincing.

Because Petitioner filed his habeas petition after April 24, 1996, it is subject to deferential review standards established in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as to claims that the California courts rejected on the merits, including this claim. See *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 532 (9th Cir. 1998) (en banc). Under the AEDPA, the Court may reverse a state court's decision denying relief only if that decision either (1) is contrary

to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) is based on an unreasonable factual determination based on the state record. 28 U.S.C. § 2254(d); see *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.), *cert denied*, 531 U.S. 944 (2000).

In conducting its review, this Court looks to the explicated decision of the California Court of Appeal, rather than one-line state Supreme Court orders denying the same claims. "[W]here there has been one reasoned state court judgment rejecting a federal claim, [federal courts sitting in habeas should presume that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991).

The Court of Appeal summarized and found the following rather complex facts underlying the competence issue, which findings Petitioner has not rebutted with clear and convincing evidence:

> In May 1996, pursuant to Penal Code section 1368, defense counsel requested a hearing to determine Maxwell's mental competency to stand trial. Five psychiatrists evaluated Maxwell. Four found him to be competent and one did not. On December 16, 1996, the trial court found defendant competent to stand trial and reinstated criminal proceedings.
>
> In January 1998, defense counsel informed the court several times that he was concerned about defendant's ability to stand trial because he was deteriorating, he was housed in the jail's psychiatric unit, and he was not communicating with defense counsel. The court was informed by a sheriff's

deputy that defendant was the subject of numerous Welfare and Institutions Code section 5150 evaluations and that he was refusing his antipsychotic medication.

The court concluded defendant was malingering and trying to feign a psychotic mental state. The court refused to suspend proceedings.

Later defense counsel said that defendant was on suicide watch and would not cooperate to allow his attorney to prepare an opening statement. The court announced that defendant had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Welfare and Institutions Code section 5150. The court still found defendant was a malingerer and feigning mental illness. It further found that no Penal Code section 1368 defense motion was pending, that defendant was competent to stand trial, and [that] defendant was excusing himself from trial pursuant to Penal Code section 1043.[1]

---

1. This section states in pertinent part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists

> Defendant resisted coming to court, was disruptive, and refused to wear the REACT [electric shock] belt. At one point, pursuant to Welfare and Institutions Code section 5250, he was certified by two psychiatrists for a 14-day hold at the hospital. But, in spite of his condition, defendant's doctors continued to release him to appear in court. Defense counsel declined to request a second competency hearing pursuant to Penal Code section 1368. The trial court continued to find that defendant was malingering and was competent to stand trial.

Lodgment 1 at 4-5.

The appellate court next explained its rejection of his claim:

> On appeal, defendant Maxwell argues that the court erred in not reassessing his competency to stand trial in January 1998. It violates . . . due process to convict an incompetent person. (*People v. Hale* (1988) 44 Cal. 3d 531, 539, [244 Cal. Rptr. 114, 119,] citing *Pate v. Robinson* (1966) 383 U.S. 375, 377.) . . . If a defendant has already been determined to be competent [after coming forward with evidence of incompetence and receiving a hearing pursuant to CAL. PENAL CODE section 1368], the trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with evidence of a substantial change in circumstances or with new evidence casting serious doubt upon the

---

> on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

validity of the previous finding of competency. (*People v. Medina,* [11 Cal. 4th 694, 734, 47 Cal. Rptr. 26 165, 186 (1995)]; *People v. Jones* (1997) 15 Cal. 4th 119, 150 [, 61 Cal. Rptr. 2d 386, 404], overruled on another point by *People* v. *Hill* (1998) 17 Cal. 4th 800, 823, fn. 1.)

Here, in order to show a change of circumstances or new evidence, defendant relies primarily upon information contained in a "Notice of Certification," pursuant to Welfare and Institutions Code section 5250, dated January 15, 1998. That notice, however, was not part of the record below. Defendant attempts to make it part of the record by a request for judicial notice[, but we] deny the request for the several reasons stated in the People's opposition. . . . Therefore, [as to] the 'Notice of Certification," we reject his arguments that the trial court was presented with a change of circumstances or new evidence.

Defendant also argues that changed circumstances or new evidence was shown by . . . (1) repeated Welfare and Institutions Code section 5150 evaluations and (2) the concerns expressed by defense counsel about defendant's ability to cooperate with or contribute to his defense. In *People v. Medina*, *supra*, 11 Cal. 4th at pp. 734-735, the court held that cursing and disruptive conduct, affirmative efforts to appear psychotic, and unwillingness to participate in one's own defense do not constitute substantial evidence necessitating a second competency hearing. Furthermore, where defense counsel expressly refuses

> to question defendant's competency, there is no substantial evidence to justify a second competency hearing. (*Adams v. Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360.)

Lodgment 9 at 5-7.

The Fourteenth Amendment's Due Process Clause bars states from trying an incompetent person. Courts thus must ensure, throughout a trial and not merely at the beginning of a trial, that a defendant not be tried further if he lacks the mental capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in his defense. *Drope v. Missouri*, 420 U.S. 162,180-81 (1975). A state must provide reasonable procedures for determining a defendant's competence. *See Odle v. Woodford*, 238 F.3d 1084, 1087 (9th Cir. 2001). A trial judge must conduct a competency hearing whenever the evidence raises a "bona fide doubt" about the defendant's competence to stand trial, even if defense counsel does not ask for one. *Odle*, 238 F.3d at 1087 (*citing Pate v. Robinson*, 383 US. 375, 386 (1966)). Federal courts assessing habeas petitions thus review the record to determine whether evidence before the state trial court raised such a "bona fide doubt" so as to require a "*Pate* hearing." *Odle*, 238 F.3d at 1107 (*citing Pate*, 383 U.S. at 386).

But such habeas review is not *de novo*. Relief is available only if the state adjudication (1) is contrary to, or unreasonably applied, federal law as determined by the Supreme Court, or (2) stands upon an unreasonable factual finding in light of the evidence. 28 U.S.C. § 2254(d)(1),(2). Here, in analyzing whether any bona fide doubt existed so as to mandate a second hearing on Petitioner's competence, the state courts relied upon *Hale*, which expressly relied upon *Pate*. As a matter of AEDPA analysis,

> their determination therefore was not 'contrary to' clearly established Supreme Court precedent. But the decision that the evidence did not require a *Pate* hearing could be either an 'unreasonable application' of *Pate* . . . or 'an unreasonable determination of the facts in light of the evidence presented' in state court. . . . Because the Supreme Court has treated the question of whether a competency hearing is required as an issue of fact, *see Maggio* [*v. Fulford*], 462 U.S. [111,] 117 [(1983)] . . . , we are inclined to analyze the state court's decision as a potentially unreasonable determination of the facts.

Odle, 238 F.3d at 1107.

The *Odle* court next turned to the underlying evidence in that case, which involved a refusal to grant an *initial* hearing under *Pate*. In the instant case, however, the dispute centers on the trial court's refusal of a second hearing, and greater deference to the determination below thus may be required. Where a state court has held a *Pate*-type competency hearing, its finding that a defendant is competent notwithstanding the "doubts" that led to that hearing is entitled to a presumption of correctness. *See Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (rejecting habeas claim that petitioner was not competent to enter a guilty plea) ("A federal court may not overturn such determinations unless it concludes that they are not 'fairly supported by the record.'") (citation omitted); *Brewer v. Lewis*, 989 F.2d 1021, 1027 (9th Cir. 1993) (*following Baal*) (relying, in part, on reports submitted by psychologists to uphold trial court).

An instructive and similar case is *Amaya-Ruiz* v. *Stewart*, 121 F.3d 486 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998), in which, prior to trial, the trial judge had two psychologists examine the petitioner and submit reports. Both found Amaya-Ruiz competent, and both suggested he was

faking a mental illness. Based on those reports, the trial judge found the petitioner competent and resumed criminal proceedings. Amaya-Ruiz later sought habeas relief on the grounds that his subsequent, increasingly uncooperative behavior should have required an additional competency hearing. The Ninth Circuit, noting that its review included "only the information that was before the state trial court at the time," compared the petitioner's behavior after the first competency-hearing evaluations with the behavior noted in those very evaluations. In essence, the evaluations had concluded that Amaya-Ruiz may have had some mental problems but was competent, though likely malingering so as to accentuate his difficulties, and affirmatively choosing not to cooperate. *Id.* at 488-90. After the initial hearing, Amaya-Ruiz behaved worse. He interrupted court proceedings loudly on numerous occasions, reportedly attempted suicide at the jail, and was uncooperative in coming to court from jail. *Id.* at 491. "These events," the Ninth Circuit wrote.

> were insufficient to [create] a bona fide doubt as to Amaya-Ruiz's competency. . . . The [prior] evaluations suggested Amaya-Ruiz was malingering and had chosen a strategy of non-cooperation. His behavior and statements that he did not understand the proceedings are consistent with a strategy of non-cooperation. . . .
>
> The evidence also indicates Amaya-Ruiz did not have a history of erratic behavior. [Witnesses] testified at trial that Amaya-Ruiz's behavior has been normal while he was living on the ranch. And, as noted by the district court, Amaya-Ruiz was capable of behaving appropriately before the jury and did not engage in any inappropriate conduct before the jury.

121 F.3d at 491-02. Similarly, Amaya-Ruiz's courtroom outbursts and subsequent removal from court during part of the

proceedings was not grounds for a second competency hearing. Such behavior was consistent with the prior evaluations suggesting he "may have been faking incompetence and may have chose to pursue a strategy of non-cooperation." *Id.* at 492. The Ninth Circuit was similarly unpersuaded by Amaya-Ruiz's reference to being prescribed various psychotropic medications while in custody. *Id.* at 492-93. Finally, *Amaya-Ruiz* refused to consider a number of factual arguments presented by the petitioner on the grounds that he had not presented them in the trial court. *Id.* at 493 (*citing United States v. Lewis*, 991 F.2d 524, 527 (9th Cir. 1993)).

Based on the evidence available to the trial court in the instant case, this Court finds (1) the trial court's conclusion is "fairly supported by the record" and thus is presumed correct, *Baal, supra*, 495 U.S. at 735; and (2) Petitioner has not rebutted that presumption, for reasons similar to those discussed in *Amaya-Ruiz*. Four of the five psychologists whom the trial court appointed in 1996 found him competent. All four concluded Petitioner was malingering by various means, including faked hallucinations and other behavior, and feigned ignorance of various trial procedure issues. Significantly, two of these four had initially reported that they believed Petitioner to be incompetent. Both soon reversed that opinion vigorously, however, when presented with evidence contradicting Petitioner's show of an inability to cooperate, to behave, or to provide information in a way that would permit him to assist in his defense. This evidence included a detailed letter written by Petitioner to an investigating detective, and audiotapes of Petitioner speaking much more coherently with police detectives than he had spoken with the examining psychologists. *See* Petition, Ex. F. One of the two briefly-fooled psychologists, Dr. Rath, summed up his ultimate view: "[Petitioner] may be understandably upset about being in jail but is grossly exaggerating any symptomatology he experiences, and comparison of materials indicates he is at times lying." *Id.*

(Rath Report of July 15, 1996). The trial court concluded after an initial competency hearing that Petitioner was competent.

The evidence available to the trial court is insufficient to rebut the state courts' determination - presumed correct under *Baal* - that Petitioner's subsequent behavior did not raise a "bona fide doubt" about his ongoing competency. Although Petitioner's behavior was arguably more disruptive than that of Amaya-Ruiz, the parallels between the two cases are persuasive. Like Amaya-Ruiz, Petitioner was diagnosed in a pretrial hearing as competent but malingering and uncooperative. Like Amaya-Ruiz, Petitioner worsened his disruptive and uncooperative behavior after that initial determination. Like Amaya-Ruiz, Petitioner points to his certainly disruptive and allegedly suicidal behavior, along with an extensive pharmacopeia of prescribed antipsychotic medication, as support for his claim that the trial court erred by not conducting another *Pate* hearing. Like the Ninth Circuit in *Amaya-Ruiz*, this Court finds such evidence insufficient to raise a bona fide doubt that Petitioner, previously diagnosed as competent and malingering, had become truly incompetent in the intervening months.

In denying this claim, the state courts thus neither acted in a manner contrary to federal law as determined by the Supreme Court nor unreasonably applied that law. Their decision also was not based on an unreasonable factual determination. Habeas relief is not justified. 28 U.S.C. § 2254(d).

IV.

PROCEDURAL DEFAULT OF REMAINING CLAIMS

Respondent argues that Petitioner's remaining claims are barred from federal habeas review because, Respondent asserts, the state courts' last explicated rejection of those claims rested upon procedural default. Under the procedural default

doctrine, when a petitioner fails to comply with the procedural rules of the state courts in presenting his claim for relief, he may not seek review of that claim in a subsequent federal habeas proceeding. *Ylst, supra*, 501 U.S. at 801. A district court properly declines to address the merits of a habeas claim where a petitioner has defaulted on the state's procedural requirements as to that claim, unless a petitioner is able to demonstrate cause for the default and resulting prejudice, or a fundamental miscarriage of justice. *Park v. California*, 202 F.3d 1146, 1151 (9th Cir. 2000).

A procedural default determination turns on the procedural history of the case and the peculiarities of the procedural rules particular to the state in question. *See O'Sullivan v. Boerckel* 526 U.S. 838, 843-46 (1999). Federal courts sitting in habeas must examine the basis of the relevant state court judgment and evaluate whether the state court's denial of the claim rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

A. Electric shock belt claim

Petitioner asserts that the trial court denied him due process by requiring him to wear a special belt, designed to inflict nonlethal electric shocks when a remote control is activated, as a condition of his appearing in court, after he had caused several prior disruptions. *See* Br. in Supp. of Petition at 2-16. (Citing a recent Ninth Circuit decision disapproving of the use of such belts in many instances, *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9th Cir. 2001), Petitioner even sought to have this petition assigned to the same District Judge who presided over *Hawkins*.) As Petitioner acknowledges, the state courts rejected this claim on direct appeal, citing the lack of any objection at trial as a procedural bar to the claim's consideration. *Id.* at 14. Respondent contends that the state courts' disposition procedurally defaults the claim in this Court. The Court agrees.

The state Court of Appeal explained the claim further, and its rejection of the claim, as follows:

> . . . In particular, defendant contends that the belt constitutes a psychological restraint which impaired his right to be present and to communicate with counsel. Defendant additionally asserts that the court prejudicially erred because: (1) the belt was an unnecessary restraint (Pen. Code, § 688); (2) the court delegated the decision to use the belt to the sheriff's department; and (3) the court failed to consider the alternative of concealed leg braces.
>
> Defendant refused to wear the belt and, thus, did not attend trial. In his petition, defendant cites additional evidence to show that he was afraid to wear the belt (1) because he knew another prisoner who had been accidentally shocked by the belt and (2) because defendant was taking medication that could have caused involuntary movements and subjected him to being shocked.
>
> None of defendant's arguments, or the evidence supporting them, was raised below. Although defendant refused to wear the belt, defense counsel did not object to its use. Therefore, defendant has waived the right to raise any such grounds on appeal and his habeas petition is procedurally barred. (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 583; *People v. Stankewitz* (1990) 51 Cal. 3d 72, 95, fn. 9; *People v. Duran* (1976) 16 Cal. 3d 282, 289; *People v. Garcia* [(1997) 56 Cal. App. 4th 1349,] 1356-1357.

Lodgment 1 at 7-8. The court went on to reject the claim on the merits as well. *Id.* at 8 ("Furthermore, the argument that the belt constituted a psychological restraint was rejected in the *Garcia* case."). Where a state court rejects a claim based not only on

the merits but also on procedural grounds, and where its reliance on the procedural bar is an independent and alternative basis for the rejection, federal habeas review is precluded. *Loveland v. Hatcher*, 231 F.3d 640, 643-44 (9th Cir. 2000). Thus, if California's stated procedural bar is independent and adequate, this Court must deny this claim unless a federal exception to default applies.

1. Independence.

For a state law ground to be "independent," it must not be interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this case, the state courts cited only California cases, not federal cases or laws, barring appellate consideration of claims regarding trial conditions, such as shackling and restraints, where no corresponding objection was raised during trial. The rule is thus independent for procedural default purposes.

2. Adequacy.

For a state law ground to be "adequate" in the procedural default context, it "must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991)). "The reason for these requirements . . . is that it is grossly unfair - and serves none of the purposes of respect for procedural rules - to forfeit an individual's constitutional claim because he failed to follow a rule that was not firmly established at the time in question." *Calderon v. Bean*, 96 F.3d 1126, 1129 (quotations and citations omitted), *cert. denied*, 520 U.S. 1204 (1997).

The authorities cited by the state Court of Appeal in support of its procedural default of this claim break no new ground in California. The state's rule barring appellate claims relating to shackling and similar security measures imposed upon a defendant, where defendant made no trial objection, had been in place for at least a decade when Petitioner defaulted at his trial. *See, e.g., People v. Walker*, 47 Cal. 3d 605, 629, 253 Cal. Rptr. 863, 876 (1982) (refusing consideration of shackling claim on appeal for failure to object at trial) (citing similar cases defaulting claims for lack of trial objection). Nothing suggests that the state's courts have not applied the rule consistently. Petitioner bears the burden of disproving adequacy by disproving a state's consistent application of default rules. *See Dugger v. Adorns*, 489 U.S. 401, 410 n.6 (1989) ("the few cases that [the petitioner] and the dissent cite as ignoring procedural defaults do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently"); *see also Jimmy Swaggart Ministries v. California*, 493 U.S. 378, 397-99 (1990). Petitioner does not address this issue and thus has failed to carry his burden.

Thus, unless an exception applies, the electric-shock-belt claim is procedurally defaulted.

3. Possible federal exceptions to procedural default.

A federal court may excuse a petitioner's procedural default if the petitioner demonstrates either (1) that he has good cause for the default and has suffered prejudice due to the default, or (2) that declining to consider his federal claims will result in a miscarriage of justice. *Coleman v. Thompson*, *supra*, 501 U.S. at 730. Petitioner has not explained why he failed to interpose a legal objection to conditioning his trial attendance on his wearing of the electric shock belt. (On habeas, Petitioner characterizes his announcement in open court that "I'm not keeping this belt on," and his refusal to sign a form relating to

the belt's use, as tantamount to a legal objection. This Court rejects this view.) The Court thus does not consider the issue of prejudice.

Petitioner also has not shown that this Court's refusal to consider the defaulted claim will result in a miscarriage of justice. Specifically, Petitioner has not shown that a constitutional violation, now the subject of one of the defaulted claims, has probably resulted in the conviction of someone who is actually innocent of the crimes for which he stands convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Coleman*, 501 U.S. at 749-50.

Accordingly, Petitioner's electric shock belt claim is procedurally barred.

B. Involuntary medication claim

As the state Court of Appeal explained in rejecting Petitioner's next claim on procedural grounds:

> . . . Maxwell argues that the trial court erred by not conducting a hearing to determine the need for the involuntary administration of psychotropic medication. (*Riggins v. Nevada* (1992) 504 U.S. 127, 135.) Defendant did not raise this issue below, possibly because one difficulty with the argument is the absence of any evidence that defendant was drugged by force. The only facts before the trial court were that defendant was refusing sometimes to take his medication. The unauthenticated medical records presented as evidence in support of the petition are inconclusive on this point. Maxwell's declaration states that he was forcibly administered Thorazine, but the medical records mention only Haldol and other drugs, not Thorazine. And the medical records

> do not state that Haldol and the other drugs were administered forcibly.
>
> This is not a case in which the record provides a basis on which to argue that defendant was denied due process because of the forced administration of drugs: "Assuming for the purpose of argument that a person who has not been judicially determined to be incompetent must furnish informed consent before being treated with antipsychotic drugs [citation], and assuming further that the state would bear the burden of proving such informed consent in the event the administration of such drugs were challenged, the state bore no such burden in the present case, because defendant did not raise the issue in the trial court." (*People v. Jones*, *supra*, 15 Cal. 4th at pp. 154-155.)
>
> On this issue, Maxwell's appeal and petition fail both procedurally and on the merits.

Lodgment 1 at 9- 10. The procedural bar upon which the state courts relied, as discussed in the *Jones* case – namely a bar against post-conviction claims regarding involuntary medication, where the claimant raised no trial objection - is "independent," in that it does not depend upon federal authorities. Petitioner also has not shown that it is not "adequate" by showing that it has been inconsistently or unpredictably applied in California. No exception for either cause and prejudice or a miscarriage of justice applies. The involuntary medication claim is thus procedurally defaulted.

C. Voluntary absence from trial

Petitioner claims the trial court violated his Fifth and Sixth Amendment rights to be present at trial by finding that he had voluntarily absented himself from trial. In support of this

claim, Petitioner points to "his diagnosed psychiatric state, the forced administration of antipsychotic medication and the order that he wear the stun belt as a condition of his presence at trial." Br. in Supp. of Petition at 17. Respondent contends that the state Court of Appeal, in rejecting the shock-belt claim on procedural grounds, also barred this factually overlapping claim:

> The finding of the California Court of Appeal that Petitioner's failure to object to the trial court's order for the REACT belt, subsumed the trial court's finding that Petitioner voluntarily absented himself from trial under . . . Cal. Penal Code § 1043. Thus, as with [the shock-belt claim], the decision of the California Court of Appeal constitutes a procedural bar to federal habeas review of this claim.
>
> . . .
>
> Despite the [trial] court's findings [that Petitioner was faking incompetence and attempting to disrupt courtroom proceedings], Petitioner continued to be disruptive and stated he would not conform his conduct to that required in the courtroom. [Citation.] Thus, when ordering Petitioner to wear a REACT belt if he wanted to be present at trial, and after defense counsel and Petitioner indicated Petitioner did not want to be in the courtroom during trial, the court found Petitioner had given up his right to be present in the courtroom during that afternoon's proceedings. 1 RT 59 . . . . The court, however, continued to provide Petitioner with opportunities to conform his conduct and return to court. Petitioner, however, would not do so.
>
> Not only did the California Court of Appeal [bar the shock-belt claim on procedural grounds, but] the court also found, "None of defendant's arguments, or the evidence supporting them, was raised below." Lodgment 1 at 8. Petitioner's challenge of the trial

court's order that he voluntarily absented himself fiom trial under Cal. Penal Code § 1043 was one of those arguments. Lodgment 9 at ii, 32-33.

Answer at 10- 11.

The Court agrees. Petitioner essentially raised this claim, disputing the finding of voluntary absence, as part and parcel of his direct-appeal claim that it was unconstitutional to condition his presence in court on his donning of the REACT belt. As noted above, Petitioner is procedurally defaulted on the latter claim. Accordingly, he has procedurally defaulted on the voluntary absence claim as well. Given the close and inextricable relationship between the two, they are the same claim for practical purposes.

V.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that judgment be entered dismissing the petition with prejudice.

DATED: October 18, 2001

/S/

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

[Filed Oct. 8, 1999]

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAMION EDWARD MOORE, Defendant and Appellant.	E022512 (Super.Ct.No. CR 60589) OPINION
THE PEOPLE, Plaintiff and Respondent, v. CLIFTON MAXWELL, Defendant and Appellant.	E022548 (Super.Ct.No. CR 60589)
In re CLIFTON MAXWELL on Habeas Corpus.	E023541 (Super.Ct.No. CR 60589)

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge.

Affirmed.

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Patrick F. Magers, Judge. Petition denied.

Robert Wayne Gehring, under appointment by the Court of Appeal, for Defendant and Appellant Damion Edward Moore.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant Clifton Maxwell.

Bill Lockyer, Attorney General, David P. Druliner, Chef Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Esteban Hernandez, Supervising Deputy Attorney General, and Lora Fox Martin, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Defendants Damion Edward Moore (Moore) and Clifton Maxwell (Maxwell) appeal convictions for first-degree and armed second-degree murder respectively. Defendants Moore and Maxwell were tried jointly before separate juries. The Moore jury acquitted a third codefendant, Mark Baker. The court sentenced Maxwell to *25* years to life and Moore to 20 years to life.

On appeal, Maxwell raises several issues regarding (1) his competency to stand trial, (2) his refusal to wear a "React" belt, and (3) the medication he received (or refused) during trial. Additionally, Maxwell collaterally attacks the judgment by a petition for writ of habeas corpus, which also addresses the latter two issues. Moore asserts instructional error. We affirm the judgments and deny Maxwell's petition summarily.

2. Facts

On December 27, 1994, defendant Maxwell learned that his car, a white Chevrolet Monte Carlo, was missing from his stepfather's garage, where the car had been parked.

In a first attempt to recover the car, defendant Maxwell, Timothy Potts (Potts), and two others went armed to Eugene Miller Bender's house, in the belief that the car was located there. The car was not there but some gunfire occurred and a man named David Jackson (Jackson) was shot but not killed.

Next, on December 29, 1994, Maxwell called Potts and said he had found the car. He asked Potts to obtain a tow truck. Then five men--including defendants Maxwell, Moore, and Mark Camilloe Baker (Baker), Basil Chad Maxwell (Basil), and Potts--drove in two vehicles to the residence of Jerry Jefferson (Jefferson). Potts, Moore, and Baker were armed.

Jefferson came out of the house to meet Potts. Jefferson was cooperative and did not object to the car being taken. Nevertheless, Moore hit him with a rifle barrel and two shots were fired at Jefferson as he ran toward the house. Potts found the missing car, without wheels, in the garage. Potts heard more shots from the house, where he saw Moore and Baker shooting at something Potts could not see. Finally, Potts left the scene with the others.

Baker testified that he saw Moore and Jefferson wrestling over a shotgun and then heard a shot.

Jefferson was found dead in his bedroom. He had been shot four times, twice each from two weapons of different calibers.

3. Maxwell's Competency to Stand Trial

In May 1996, pursuant to Penal Code section 1368, defense counsel requested a hearing to determine defendant Maxwell's mental competency to stand trial. Five psychiatrists evaluated Maxwell. Four found him to be competent and one did not. On December 16, 1996, the trial court found defendant competent to stand trial and reinstated criminal proceedings.

In January 1998, defense counsel informed the court several times that he was concerned about defendant's ability to stand trial because he was deteriorating, he was housed in the jail's psychatric unit, and he was not communicating with defense counsel. The court was informed by a sheriff's deputy that defendant was the subject of numerous Welfare and Institutions Code section 5150 evaluations and that he was refusing his antipsychotic medication.

The court concluded defendant was malingering and trying to feign a psychotic mental state. The court refused to suspend proceedings.

Later defense counsel said that defendant was on suicide watch and would not cooperate to allow his attorney to prepare an opening statement. The court announced that defendant had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Welfare and Institutions Code section 5150. The court still found defendant was a malingerer and feigning mental illness. It further found that no Penal Code section 1368 defense motion was pending, that defendant was competent to stand trial, and defendant was excusing hunself from trial pursuant to Penal Code section 1043.

Defendant resisted coming to court, was disruptive, and refused to wear the React belt. At one point, pursuant to

Welfare and Institutions Code section 5250, he was certified by two psychiatrists for a 14-day hold at the hospital. But, in spite of his condition, defendant's doctors continued to release him to appear in court. Defense counsel declined to request a second competency hearing pursuant to Penal Code section 1368. The trial court continued to find that defendant was malingering and was competent to stand trial.

On appeal, defendant Maxwell argues that the court erred in not reassessing his competency to stand trial in January 1998. It violates the constitutional right of due process to convict an incompetent person. (*People* v. *Hale* (1988) 44 Cal.3d 531, 539, citing *Pate* v. *Robinson* (1966) 383 U.S. 375, 377.) Defendant has the burden of proof on the issue of competency (*People* v. *Medina* (1995) 11 Cal.4th 694, 734-735) but when he comes "'forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right . . . .'" (*Hale*, *supra*, at p. 539 citing *People* v. *Pennington* (1967) 66 Cal.2d 508, 518.) If a defendant has already been determined to be competent, the trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with evidence of a substantial change in circumstances or with new evidence casting serious doubt upon the validity of the previous finding of competency. (*People* v. *Medina*, *supra*, 11 Cal.4th at p. 734; *People* v. *Jones* (1997) 15 Cal.4th 119, 150, overruled on another point by *People* v. *Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Here, in order to show a change of circumstances or new evidence, defendant relies primarily upon information contained in a "Notice of Certification," pursuant to Welfare and Institutions Code section 5250, dated January 15, 1998. That notice, however, was not part of the record below. Defendant attempts to make it part of the record on appeal by a request for judicial notice filed October 7, 1998. We deny the request as it pertains to the "Notice of Certification" for

the several reasons stated in the People's opposition, filed October 22, 1998, pp. 4-5.[1] Therefore, to the extent defendant relies upon the "Notice of Certification," we reject his arguments that the trial court was presented with evidence of a change of circumstances or new evidence of incompetency.

Defendant also argues that changed circumstances or new evidence was shown by other evidence in the record of (1) repeated Welfare and Institutions Code section 5150 evaluations and (2) the concerns expressed by defense counsel about defendant's ability to cooperate with or contribute to his defense. In *People* v. *Medina*, *supra*, 11 Cal.4th at pp. 734-735, the court held that cursing and disruptive conduct, affmative efforts to appear psychotic, and unwillingness to participate in one's defense do not constitute substantial evidence necessitating a second competency hearing. Furthermore, where defense counsel expressly refuses to question defendant's competency, there is no substantial evidence to justify a second competency hearing. (*Adams* v. *Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360.)

Defendant Maxwell's reliance on Penal Code section 1367.1 is completely inappropriate since that section only applies in misdemeanor proceedings. (Pen. Code, § 1367, subd. (b).)

The record amply supports the trial court's decision and the exercise of its discretion with respect to the issue of

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1. The "Notice of Certification" is also attached as exhibit H to defendant's petition for writ of habeas corpus. For the reasons stated here, we deny the petition. Therefore, the notice is not part of the record on appeal and was not, in any case, properly authenticated by the request for judicial notice or the petition.

defendant's competency. (*People* v. *Frye* (1998) 18 Cal.4th 894, 951-953.)

4. The React Belt

On appeal and in his petition, defendant Maxwell argues that the trial court erred in ordering him to wear a React belt,[2] a security device whlch administers an electric shock to the wearer, as a condition of defendant being present at trial. In particular, defendant contends that the belt constitutes a psychological restraint which impaired his right to be present and to communicate with counsel. Defendant additionally asserts that the court prejudicially erred because: (1) the belt was an unnecessary restraint (Pen. Code, § 688); (2) the court delegated the decision to use the belt to the sheriff's department; and (3) the court failed to consider the alternative of concealed leg braces.

Defendant refused to wear the belt and, thus, did not attend trial. In his petition, defendant cites additional evidence to show that he was afraid to wear the belt (1)

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2. "React" stands for "Remote Electronically Activated Control Technology." (Nieto Dahlberg, S. "The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions." 30 St. Mary's L.J. 239, 242.) A description of the React belt appears in *People* v. *Garcia* (1997) 56 Cal.App.4th 1349, 1354: "The belt will deliver 50,000 volts of electricity if activated by a remote transmitter that is controlled by an attending officer. This shock will immobilize the wearer and may create a '[p]ossibility of self-defecation' and a '[p]ossibility of self-urination[.]'" A prisoner notification form states the belt could be activated if the wearer engages in: "'A. Any outburst or quick movement [¶] B. Any hostile movement [¶] C. Any tampering with the belt [¶] D. Failure to comply with verbal command for movement of your person [given by an officer]."

because he knew another prisoner who had been accidentally shocked by the belt and (2) because defendant was taking medication that could have caused involuntary movements and subjected him to being shocked.

None of defendant's arguments, or the evidence supporting them, was raised below. Although defendant refused to wear the belt, defense counsel did not object to its use. Therefore, defendant has waived the right to raise any such grounds on appeal and his habeas petition is procedurally barred. (*People* v. *Tuilaepa* (1992) 4 Cal.4th 569, 583; *People* v. *Slankewirz* (1990) 51 Cal.3d 72, 95, fn. 9; *People* v. *Duran* (1976) 16 Cal.3d 282, 289; *People* v. *Garcia*, *supra*, 56 Cal.App.4th at pp. 1356- 1357.)

Furthermore, the argument that the belt constituted a psychological restraint was rejected in the *Garcia* case. (*People* v. *Garcia*, *supra*, 56 Cal.App.4th at pp. 1356- 1357.) Defendant tries to argue that this case differs from *Garcia* because of defendant's purported incompetency. But we have held that the court's ruling on the issue of competency was correct. Therefore, we find no credible distinction to be made from *Garcia*. And, just as in *Garcia*, any argument that defendant may have been psychologically restrained by the belt is pure speculation, given that defendant did not wear the belt or attend trial.

5. Involuntary Medication

Both on appeal and in his petition, Maxwell argues that the trial court erred by not conducting a hearing to determine the need for the involuntary administration of psychotropic medication. (*Riggins* v. *Nevada* (1992) 504 U.S. 127, 135.) Defendant did not raise ths issue below, possibly because one difficulty with the argument is the absence of any evidence that defendant was drugged by force. The only facts before the trial court were that defendant was refusing sometimes to

take his medication. The unauthenticated medical records presented as evidence in support of the petition are inconclusive on this point. Maxwell's declaration, states that he was forcibly administered Thorazine but the medical records mention only Haldol and other drugs, not Thorazine. And the medical records do not state that Haldol and the other drugs were administered forcibly.

This is not a case in which the record provides a basis on which to argue that defendant was denied due process because of the forced administration of drugs: "Assuming for the purpose of argument that a person who has not been judicially determined to be incompetent must furnish informed consent before being treated with antipsychotic drugs [citation], and assuming further that the state would bear the burden of proving such informed consent in the event the administration of such drugs were challenged, the state bore no such burden in the present case, because defendant did not raise the issue in the trial court." (*People* v. *Jones*, *supra,* 15 Cal.4th at pp. 154-155.)

Furthermore, "Defendant cites no authority, and we are aware of none, that would require the state to demonstrate, sua sponte, that a criminal defendant has furnished informed consent for any antipsychotic medications provided by the state." (*Id.*, at p. 155.)

On this issue, Maxwell's appeal and petition fail both procedurally and on the merits.

6. Instructional Error

Defendant Moore makes one argument, that the court erred when it gave the People's requested special jury instruction as follows:

"Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether a defendant is an aider and a bettor or a direct perpetrator.

"The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other."

Defendant Moore argues that the instruction improperly directed the verdict against him on the ultimate issue of whether he was guilty of murder. He contends that the instruction states "that there is no doubt that Mr. Moore is either an aider and abettor or a direct perpetrator" and that "each juror may decide Mr. Moore is guilty without having to decide for themselves whether he is an aider and abettor or a direct perpetrator." As also stated in appellant's opening brief: "The plain meaning of the court's words was that there could be no doubt that by one theory or the other, Mr. Moore was guilty of murder. This was error of constitutional dimensions."

As acknowledged by defendant, the subject instruction was based on language from *People* v. *Santamaria* (1994) 8 Cal.4th 903, 919, in which the California Supreme Court held that jurors need not be unanimous in deciding whether a defendant is a direct perpetrator or an aider and abettor when returning a guilty verdict, so long as each juror believes defendant, beyond a reasonable doubt, to be guilty of the crime charged. This is a correct statement of the law. (*People* v. *Champion* (1995) 9 Cal.4th 879, 931; *Schad* v. *Arizona* (1991) 501 U.S. 624, 624.)

Furthermore, we have read the subject instruction and do not find that it can reasonably be interpreted in the strained manner suggested by defendant. The instruction does not tell the jury that defendant was either a perpetrator or an aider and abettor. Nor does the instruction tell the jurors that they do not need to decide whether he was one or the other. The instruction clearly states that each individual juror must decide whether defendant committed the offense as either a perpetrator or an aider and abettor. There was no error in giving the subject instruction.

7. Disposition

We affirm the judgments against defendants Maxwell and Moore and dismiss Maxwell's petition for writ of habeas corpus.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/Ramirez
P.J.

s/Ward
J.

APPENDIX E

OFFICE of the CLERK
UNITED STATES COURT of APPEALS
for the NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file date on the attached decision of the Court.

MANDATE (FRAP 41)

The mandate will issue seven (7) calendar days after the expiration of the time for filing a petition for rehearing or seven (7) calendar days from the denial of a petition for rehearing, unless the Court directs otherwise. If a stay of mandate is sought, an original and three (3) copies of the motion must be filed.

PETITION FOR REHEARING (FRAP 40)

Filing Time: A petition for rehearing may be filed within fourteen (14) days from entry of judgment. If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment.

An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. If the mandate has

issued, the petition for rehearing should be accompanied by a motion to recall the mandate.

Purpose: A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material point of fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel.

3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

Petitions which merely reargue the case should not be filed.

Statement of Counsel: A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations described in Purpose, section above, exist. The points to be raised must be clearly stated. Lacking such a statement, the petition will not be filed.

Form: The fifteen (15) proportionally spaced or monospaced face page limit allowed by FRAP 40 must be observed and the petition must comply in form with FRAP 32. Three (3) copies of the petition and the original are required unless the petition includes a suggestion for rehearing en banc. If it does, fifty (50) copies and the original must be filed.

The petition: (1) must be directed to the Clerk of Court, (2) contain an original signature of the counsel/pro per litigant submitting the petition; and, (3) indicate complete proof of service to all parties.

APPENDIX F

[Filed April 23, 2003]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL, Petitioner - Appellant, v. ERNIE ROE, WARDEN, Respondent - Appellee.	No. 02-55143 D.C. No. CV-01-00131-VAP Central District of California Riverside ORDER

The court is in receipt of respondent's motion to strike the opening brief, exhibits to motion to strike the excerpts of record, and supplemental exhibit to motion to strike the excerpts of record. The court is also in receipt of appellant's response to respondent's motion to strike the opening brief and respondent's reply thereto.

Respondent's motion to strike appellant's opening brief is granted. *See* Ninth Circuit Rule 10-2. Respondent's motion to strike Exhibits K, L, and N is granted. Exhibits K, L, and N are stricken from the record. Appellant shall file a corrected opening brief by May 21, 2003; the answering brief is due June 20, 2003 and the optional reply brief is due 14 days from service

02-55143

of the answering brief.

Copies of the motion and response shall be lodged for the merit's panel's reference.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/
Lorela B. Bragado
Deputy Clerk
Ninth Cir. R. 27-7l Appendix A,
General Orders for the
United States Court of Appeals

pro 4.21

APPENDIX G

[Filed June 23, 2003]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL, Petitioner - Appellant, v. ERNIE ROE, WARDEN, Respondent - Appellee.	No. 02-55143 D.C. No. CV-01-00131-VAP Central District of California Riverside ORDER

Before: Peter L. Shaw, Appellate Commissioner

Appellant's motion for reconsideration is granted. The April 23, 2003 order is vacated. The motions to strike the opening brief and excerpts of record are denied without prejudice to raising the issues in the answering brief.

The opening brief filed December 30, 2002 shall be submitted to the merits panel. Appellee's answering brief, responding to the December 30, 2002 opening brief, is now due July 21, 2003. The optional reply brief is due within 14 days after service of the answering brief.

Appellee's motion for an extension of time to file the answering brief is denied as unnecessary.

The substitute opening brief filed on May 22, 2003 is lodged for the merit panel's review.

/s/
General order 6.3(e)

promo commissioner 6.18.03\6

APPENDIX H

[Filed July 2, 2004]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL, Petitioner - Appellant, v. **ERNIE ROE, WARDEN,** Respondent - Appellee.	No. 02-55143 D.C. No. CV-01-00131-VAP(RZ) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted December 16, 2003
Pasadena, California

Before: HUG, B. FLETCHER, and WARDLAW, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Clifton Maxwell appeals the district court's denial of his habeas corpus petition, arguing that the trial in which a jury convicted him of first-degree murder was a violation of his Fourth and Fifth Amendment rights because he was incompetent to stand trial. Claims regarding incompetence are questions of fact, so, under the standard of review applicable to habeas petitions, Maxwell must show that the trial court's conclusion that he was competent to stand trial was an "unreasonable determination of the facts in light of the evidence presented." *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Under our jurisprudence, Maxwell "was entitled to a hearing on his competency to stand trial if a reasonable judge would have . . . a 'bona fide doubt' [as to] competence." *Id.* at 1108. Moreover, a trial court's finding of competence may be reversed as unreasonable if the fact finding procedure followed by the judge was clearly inadequate. *Id.* at 1109.

Because the record in this case is insufficiently developed, we cannot judge the adequacy of the trial court's factfinding procedure, and are therefore unable to determine whether its conclusion of competency was unreasonable in light of the facts presented. We are therefore unable to come to a conclusion on whether the trial court's actions were unreasonable in light of the facts. We remand this case to the district court to hold a full evidentiary hearing on Maxwell's competency during the January 1998 trial, taking into account the following concerns.

On remand, the district court should consider both the facts established in the record and the facts that a 'more complete inquiry' by the trial court could have revealed. *Id.* A trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent. See *Medina v. California*, 505 U.S. 437, 449 (1992); *Drope v. Missouri*, 420 U.S. 162, 179 (1975); *Miles v.Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997). The fact that Maxwell's

lawyer did not ask for an additional competency hearing may not be considered dispositive evidence of Maxwell's competency. *Odle v. Woodford*, 238 F.3d 1084, 1088-89 (9th Cir.) (noting that "counsel is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent"), *cert. denied*, 534 U.S. 888 (2001); *Miles*, 108 F.3d at 1113. Nor may his lawyer's failure to object be considered procedural default or a waiver of Maxwell's right to an additional competency hearing. *Id.*

In light of the trial court's continuing responsibility to ensure that a defendant is not tried while incompetent, we are concerned about the following facts. First, in the thirteen-month interval between the competency hearing upon which the trial court relied and the trial, Maxwell was determined numerous times to be "gravely disabled" or a danger to himself or others as a result of mental disorder.[1] Second, Maxwell's behavior at trial was erratic and strange. And, third, during the course of trial Maxwell was involuntarily hospitalized for attempted suicide. The record of what the trial court knew about the further details of Maxwell's hospitalization is unclear.

When analyzing this evidence, the district court relied on *Amaya Ruiz v. Stewart,* 121 F.3d 486 (9th Cir. 1997), to support its finding that the evidence did not require the trial court to hold an additional competency hearing. Despite some similarities in the cases, we find the differences more persuasive.

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1. California Welfare and Institutions Code § 5150 authorizes a 72-hour commitment of an inmate who, "as a result of mental disorder, is a danger others, or to himself or herself, or gravely disabled." This section was invoked against Maxwell numerous times during his pre-trial detention.

Most important, the time between Amaya-Ruiz's criminal action and his conviction was not more than nine months. His pre-trial competency hearing, then, could not have pre-dated the trial by more than a few months. With so short a time period, the trial court could reasonably rely on the competency determination that indicated that Amaya-Ruiz was probably malingering. In Maxwell's case, however, justice was not so swift. More than a year elapsed between Maxwell's competency determination and his trial. The competency determination was itself based on medical reports that were a few months old. After so much time had passed, the trial court would have been unreasonable in relying solely on a stale competency determination in the face of contradictory evidence. See *deKaplany v. Enomoto*, 540 F.2d 975, 980-81 (9th Cir. 1976) (en banc) (stating that once there is substantial new evidence of incompetency, a bona fide doubt is raised that cannot be dispelled by resort to pre-existing conflicting evidence). This court has repeatedly acknowledged the dramatic changes that can take place in a defendant's mental state in even a short period of time. See *Miles*, 108 F.3d at 1111 (change in competency within one month); *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) (noting that old psychiatric reports may lose their probative value over time, especially if subsequent facts and circumstances contradict their conclusions).

In addition to the benefit of two current competency evaluations, the trial court in *Amaya-Ruiz* was presented with significantly less evidence of incompetence than was before the court in this case. Amaya-Ruiz's behavior was consistent

with a strategy of noncooperation.[2] If the facts alleged in this appeal are correct, Maxwell's case is materially different from *Amaya-Ruiz*. During the year preceding trial, Maxwell's behavior was erratic whether he was in court or in jail. He was unable to control himself in pretrial proceedings and was involuntarily committed several times while in jail awaiting trial, and once during trial. Because he repeatedly waived his right to be present at trial, the jury that convicted Maxwell never actually saw him. Maxwell's sustained erratic behavior, in light of the long interval between his competency evaluations and his trial, presents a much more compelling argument for incompetency than did Amaya-Ruiz's behavior during his trial.

Since we do not know how much of this evidence was available to the trial court at the time of Maxwell's trial, we remand to the district court to hold an evidentiary hearing to consider the reasonableness of the trial court's determination that Maxwell was competent to stand trial.

REVERSED AND REMANDED.

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2. There was evidence presented on appeal that Amaya-Ruiz had been treated by the jail psychiatrist, had been medicated with psychotropic drugs, had acted irrationally in jail, and had attempted suicide on an occasion other than the one described in the record before the trial court. *Amaya-Ruiz*, 121 F.3d at 493. It is clear, however, that this evidence was not presented to the state court during trial in *Amaya Ruiz*. 121 F.3d at 493. By contrast, in this case, it is unclear what evidence was before the state court at the time of trial.

APPENDIX I

02-55143

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON WAYNE MAXWELL,

Petitioner-Appellant,

v.

ERNIE ROE, WARDEN,

Respondent-Appellee.

TO THE HONORABLE BETTY FLETCHER, PROCTOR HUG KIMBERLY WARDLAW, CIRCUIT JUDGES:

Warden Roe requests rehearing and suggests rehearing en banc of the July 2, 2004, opinion of this Court. The slip opinion that reversed the denial of Maxwell's Petition for Writ of Habeas Corpus, and remanded to the District Court for a "full evidentiary hearing," is contained at Appendix A. Fed. R. App. P. 35, 40.

INTRODUCTION

The key issue in this case is this: When a state court conducts a full hearing on a defendant's competency to stand trial, considers all relevant evidence presented to it, and finds the defendant competent, does 28 U.S.C. § 2254(e)(2) permit a federal court to hold an evidentiary hearing to conduct a "more

complete inquiry" based upon documents the defendant presented for the first time in the federal appeal?

This question raises three issues of exceptional importance. Fed. R. App. P. 35(a)(2). First, it demonstrates that there is a void in this Court's jurisprudence regarding how to evaluate state court competency determinations under AEDPA. Compare Amaya-Ruiz v. Stewart, 121 F.3d 486 (9th Cir. 1997) (the pre-AEPDA case relied on by the District Court where the state court conducted a full competency hearing), and Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000) (the post AEDPA case relied on by the panel decision where the state court did not conduct a competency hearing). Second, the question raises the issue of when it is appropriate to conduct a federal evidentiary hearing to perform "a more complete inquiry" on a defendant's competency based on evidence never presented to the state court; and equally important, whether the panel's decision conflicts with the United States Supreme Court's recent decision in Holland v. Jackson , 124 S. Ct. 2736, 2004 U.S. LEXIS 4758 (No. 03-1200 June 28, 2004). Third, by considering documents presented by Maxwell for the first time on appeal, the question asks whether a petitioner should be permitted to disregard established rules of appellate procedure and the rules of the Ninth Circuit governing the submission of "excerpts of record." Fed. R. App. P. 35(b)(1)(B).

Because federal courts are routinely called upon to review competency determinations made by state courts, the questions raised in this case, concerning the rules governing the standards employed by federal courts in determining whether a state court competency hearing was adequate under Pate v. Robinson, 383 U.S. 375 (1966), raises questions of exceptional importance.

SUMMARY OF RELEVANT FACTS

Essential to the understanding of these important issues are the "rather complex facts underlying the competence issue" (ER D at 5) as resolved in the state trial court:

In 1995, Clifton Maxwell and three co-defendants were charged with murder. 1 CT 169. In May 1996, under Cal. Penal Code § 1368[1] defense counsel requested a hearing to determine Maxwell's competency to stand trial. Three psychologists and one psychiatrist evaluated Maxwell and found him to be competent; three of the experts found Maxwell to be a malingerer. SER 212.[2] On December 16, 1996, counsel informed the court that Maxwell wished to submit the competency question on the reports and represented that he had "discussed this with Mr. Maxwell" who agreed with the decision. The trial court asked Maxwell, who was not being disruptive, if he agreed. Maxwell said he did. Based on the reports, the trial court found Maxwell competent to stand trial and reinstated criminal proceedings. 12/16/96 RT at 2, 5-6.

Maxwell subsequently appeared at several continuance hearings and was not disruptive. 1 CT 262. In January 1997, counsel asked for additional time to prepare for trial, stating that he and Maxwell were "still working on the case and still in the process of preparing for it." 1 CT 266, 268. The trial court asked Maxwell if he wished to waive time and he did. 1 CT 276. Thereafter, Maxwell was present for several additional

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1. Competency proceedings initiated under Cal. Penal Code §§ 1367 and 1368 employ the standards set forth in Pate v. Robinson, 383 U.S. 375 (1966). *See* People v. Pennington, 66 Cal. 2d 508, 516, 517, 426 P.2d 942, 947-948 (1967).

2. Throughout this petition, Warden Roe refers to Appellee's Supplemental Excerpts of Record as "SER."

continuance hearings; at no time did he act strangely or disrupt the court proceedings. 1 CT 280, 286, 288, 291; 2 CT 304.

On January 6, 1998, the judge assigned to preside over Maxwell's trial reviewed the psychological reports, found no change in circumstances, and found Maxwell to be competent. SER 212-213. On various subsequent dates in January, defense counsel informed the court that he was concerned about Maxwell's ability to stand trial because he was deteriorating, was housed in the jail's psychiatric unit, and was not communicating with counsel. A sheriff's deputy also informed the court that Maxwell was the subject of numerous evaluations under Cal. Welf. & Inst. Code § 5150 and that he was refusing his antipsychotic medication. ER D at 5; ER E at 4. The court concluded, however, that Maxwell was malingering and trying to feign a psychotic mental state, and did not suspend proceedings. ER D at 6; ER E at 4.

On January 13, 1998, defense counsel informed the court that Maxwell was on suicide watch and would not cooperate to allow counsel to prepare an opening statement. Counsel indicated he had spoken with Maxwell the previous Friday at which time he felt Maxwell "would be difficult again and probably would not change his attitude." SER 242-43. Maxwell did want to come to court and asked his attorney to move for substitute counsel. SER 243. Counsel stated that when he last spoke to Maxwell, Maxwell said he did not want to come to court and if he did he would be disruptive. SER 245. Counsel stated Maxwell might never want to come to court and that he believed it was in everyone's best interest not to try and forcibly bring Maxwell to court because he could put "a lot of people in danger." SER 245.

The court announced that Maxwell had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Cal. Welf.& Inst. Code § 5150. The court still found Maxwell was malingering and feigning mental

illness so he would not have to go to trial. ER D at 5-6; ER E at 4; SER 245-50. The court found Maxwell elected not to cooperate even though he had the capacity to do so, saying, "He may feel that he is generating appellate issues which might present a better defense than an actual defense at trial to the factual charges." SER 248. Thereafter, counsel told the court that Maxwell asked him to tell the court that he did not want to come to court, that he wanted the court to review the "1368" reports, to point out to the court that he had a history of psychiatric problems, that he wanted the court to know he was on medication in jail, and that he had received threatening letters from a co-defendant, who was also a witness. SER 248-49. The court then found Maxwell had voluntarily absented himself from trial and, after defense counsel declined to express a doubt as to Maxwell's competency, stated it did not have a doubt as to Maxwell's competency. SER 250-51.

The next day, counsel indicated that Maxwell had told him he was not willing to come to court, and that he would not behave and conform his behavior to that required in the courtroom. SER 253.

The following day two psychiatrists certified Maxwell for a 14 day hold at the hospital under Cal. Welf. and Inst. Code section 5150. SER 255. Upon learning this the court again found that Maxwell was malingering:

> [S]o we have a very clear record, I do not want this record to suggest or reflect that this Court is proceeding against Mr. Maxwell when he is actually incompetent. [¶] I feel based upon the information that I have on Mr. Maxwell that he is malingering and feigning this situation to put himself in a psychiatric light which indicates his lack of competency to proceed. [¶] I think that is feigned.

SER 256-57.

Out of an abundance of caution, however, the court ordered Maxwell's doctor to provide a summary of his impressions of Maxwell "so we can have a clear record." SER 257.

The next day, Maxwell appeared in court. The court stated that for the past week, Maxwell had been housed at the hospital security ward for his own benefit and safety. The court had a one-page faxed note from Maxwell's doctor indicating Maxwell had been cleared to come to court for the past week. When the court asked Maxwell if he wanted to be present during trial, defense counsel stated that Maxwell told him he did not want to be present for trial. SER 260-61. The court again stated it had no doubt that Maxwell was competent to stand trial. Therefore, it had not moved for an additional evaluation under 1368. Defense counsel informed the court that he had "continual contact with Mr. Maxwell during the course of the trial, visiting him at the county jail in Riverside General Hospital." When asked by the court if he was making a 1368 motion, counsel said no, and said that he had no doubt about Maxwell's competency.[3] SER 262.

When the court again invited Maxwell to remain for trial, Maxwell stated he was not going to sit and "let these people lie on me." SER 262. The court observed that Maxwell was quietly sitting during the proceeding and asked counsel if he wanted Maxwell to remain for trial. Counsel thought Maxwell would be disruptive and should not be present for trial. SER 263-64.

After the jury convicted Maxwell of first degree murder, at sentencing the trial court stated:

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3. Maxwell has never alleged that defense counsel was ineffective.

> And during the course of this case, Mr. Maxwell has been removed from the court several different times for his behavior, and it's very clear to me that this individual is competent and was competent to stand trial. ¶ And he was feigning a mental disease or disorder to, number one, disrupt the proceedings, and, two, to attempt in some fashion to convince this Court that because of his mental problem, he was incompetent to stand trial and it's clear to me that has been totally feigned and fabricated.

Sentencing RT at 20.

III.

WHEN A STATE COURT CONDUCTS A FULL HEARING INTO A DEFENDANT'S COMPETENCY, CONSIDERS ALL RELEVANT EVIDENCE PRESENTED IN STATE COURT, AND FINDS THE DEFENDANT COMPETENT, 28 U.S.C. § 2254(E)(2) DOES NOT PERMIT A FEDERAL COURT TO HOLD AN EVIDENTIARY HEARING TO CONDUCT A "MORE COMPLETE INQUIRY" BASED UPON DOCUMENTS NEVER PRESENTED TO THE STATE COURT

The decision of the California Court of Appeal reviewed the trial court's factual finding of Maxwell's competency under Pate v. Robinson, and held that the trial court properly found Maxwell competent. The District Court applied the presumption of correctness set forth in 28 U.S.C. § 2254(e)(2) to the findings of the trial court, and found that the Court of Appeal did not unreasonably apply United States Supreme Court precedent. In so doing it relied on Amaya-Ruiz a pre-

AEDPA case that denied an evidentiary hearing on more egregious facts than in this case.

The panel decision, however, ignored the requirements of AEDPA; did not apply the presumption of correctness to any of the numerous factual findings made by the trial court, and ignored the fact that Maxwell's new evidence had never been presented in state court. The panel decision ordered the District Court to hold a "full evidentiary hearing" to determine what a "more complete inquiry" by the trial court would have revealed regarding Maxwell's competency, and relied on Torres v. Prunty, a post-AEDPA case in which the trial court held no competency hearing, whatsoever.

Two things are apparent. First, Torres v. Prunty is not persuasive authority for ordering an evidentiary hearing in this case because, there, the state court conducted no competency hearing and made no factual findings. Second, if Torres v. Prunty can be read to apply to post-AEDPA cases in which a trial court did hold a competency hearing, it obviously conflicts with the Supreme Court's recent holding in Holland v. Jackson. These points are discussed below.

A. By Relying On Torres v. Prunty, The Decision Overlooks The Requirements For An Evidentiary Hearing And Impermissibly Orders An Evidentiary Hearing to Conduct A "More Complete Inquiry" To Consider Documents Never Presented In State Court

To support its decision to remand for an evidentiary hearing to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed," the decision in this case relied on Torres v. Prunty. (Slip. Opn. at 2-3.) In Torres, a post-AEDPA case in which the more rigorous standards for an evidentiary hearing were applicable, this Court held that the trial court's refusal to hold

a competency hearing constituted an inadequate fact finding process. Torres, 223 F.3d at 1105-08. The state trial court never questioned the defendant, never suspended proceedings to have Torres evaluated, and failed to credit defense counsel's expressed doubt as to Torres's competency. Id. at 1109.

By contrast, in this case two judges, the first in a formal competency hearing, the second in reviewing, without objection from defense counsel, the same information considered by the first judge, considered numerous psychological reports and found Maxwell competent. The trial judge then remained alert each day for any changes in Maxwell's mental state. Further, defense counsel continually expressed no doubt as to Maxwell's competency and the court repeatedly found that Maxwell was malingering. The trial court made numerous factual findings that must be afforded the presumption of correctness under 28 U.S.C. § 2254(e)(1).

The decision by the panel attempts to distinguish Amaya-Ruiz v. Stewart, from the present case. Yet, in Amaya-Ruiz, a pre-AEDPA case in which the more liberal evidentiary hearing requirements applied, the trial court held two competency hearings prior to trial and determined the defendant was competent to stand trial. Amaya Ruiz, 121 F.3d at 488. In determining the trial court was not required to have held another competency hearing, Amaya-Ruiz held that it could examine only the information that was before the state trial court when it made its competency determinations. Id. at 489. The Court could not consider evidence which was not presented until state post-conviction proceedings to determine if the trial court should have ordered further evaluations of the defendant. Id. at 493. Instead, based on counsel's doubt as to the defendant's competency and two pre-trial evaluations indicating the defendant was a malingerer, Amaya-Ruiz held that the trial court's "explicit finding that Amaya-Ruiz was intentionally

attempting to hinder the proceedings with his disruptive conduct" was a "factual finding . . . entitled to a presumption of correctness." Id. at 490-92.

It is difficult to see how the state court's decision in this case warrants a different result than Amaya-Ruiz. Indeed, if these more-egregious facts did not entitle Amaya-Ruiz to an evidentiary hearing governing the requirements for an evidentiary hearing prior to the passage of the AEDPA (id. at 488 n.1), it is impossible to see how the facts in this case justify an evidentiary hearing under post-AEDPA law. After all, two judges found Maxwell competent, including the trial judge who continually made certain the record did not show the court was proceeding against Maxwell while he was incompetent, defense counsel expressed no doubt, and there were numerous findings of malingering.

Thus, rehearing en banc is necessary to fill the void between this Court's decision in Amaya-Ruiz and Torres, and clarify how AEDPA's presumption of correctness and requirements for an evidentiary hearing apply to state-court competency proceedings.

B. Under the AEDPA's Mandated Evidentiary Hearing Requirements And the Presumption of Correctness To Be Afforded A State Trial Court's Competency Determinations, A Federal Court Cannot Order An Evidentiary Hearing To Perform A "More Complete Inquiry" Based On Evidence Never Presented To The State Court

The well-settled law regarding federal habeas review at competency hearings casts grave doubt on the efficacy of the panel decision, and its insistence that Torres controlled this case.

A federal court may not overturn a state trial court's competency determinations "unless it concludes that they are not 'fairly supported by the record." Demosthenes v. Baal, 495 U.S. 731, 735 (1990) citing Maggio v. Fulford, 462 U.S. 111, 117 (1983); Davis v. Woodford, 333 F.3d 982, 997 (9th Cir. 2003). Accordingly, a state court's factual finding as to a defendant's competence is binding on a federal habeas court. Demosthenes, 495 U.S. at 735.

In reviewing whether a state trial court should have sua sponte conducted a competency hearing, a federal court "may only consider the evidence that was before the trial judge." Davis, at 997; Williams v. Woodford, 306 F.3d 665, 704 (9th Cir. 2002); United States v. Lewis, 991 F.3d 524, 527 (9th Cir. 1993).

When a federal appeals court has not personally observed the defendant, as the state court did, it has "even less reason to overturn what is essentially a factual determination." Demosthenes, 495 U.S. at 737; see also Williams v. Woodford, 306 F.3d at 706 citing Medina v. California, 505 U.S. 437, 450 (1992)("defense counsel will often have the best informed view of the defendant's ability to participate in his defense"); Torres v. Prunty, 223 F.3d at 1109 ("defense counsel was in the best position to evaluate Torres's competence and ability to render assistance"); Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir. 1991) (fact that defense counsel considered the defendant competent to stand trial was significant evidence that the defendant was competent).

Under 28 U.S.C. § 2254(e)(2), a district court presented with a request for an evidentiary hearing as to a particular claim must first determine whether the factual basis to support the claim was developed in the state court. Williams v. Taylor, 529 U.S. 420, 432 (2000); Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2001). A petitioner is barred from obtaining an evidentiary hearing under the AEDPA when he does not

exercise diligence in developing the facts in the relevant state court proceedings and has not shown, by clear and convincing evidence, that no reasonable fact finder would have found the petitioner guilty of the underlying crime but for the alleged constitutional error. Gandarela, 286 F.3d at 1087; Griffin v. Johnson, 350 F.3d 956, 966 (9th Cir. 2003); Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001). The petitioner must establish what additional, material facts he expects an evidentiary hearing will reveal. Gandarela, 286 F.3d at 1087.

The United States Supreme Court's recent decision in Holland v. Jackson, 124 S. Ct. 2736, 2004 U.S. LEXIS 4658 (No. 03-1200 June 28, 2004), reaffirms these principles under AEDPA. In Holland, the Supreme Court granted certiorari and reversed and remanded the granting of a habeas petition holding in part, that the Sixth Circuit failed to make the required finding that the petitioner had been diligent in pursuing newly discovered evidence in support of his claim that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984). 2004 U.S. LEXIS 4658 at *4-6. The evidence could have been the subject of an evidentiary hearing in the District Court, but only if the inmate was "not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by section 2254(e)(2) were met." Id. at *5. Where a district court makes no finding that an inmate has been diligent in pursing the evidence or that the limitations set forth in section 2254(e)(2) were met, and a court of appeals does not independently inquire into these matters, but simply ignores entirely the state court's independent ground for its decision, that evidence is not properly before the federal court. Id. at *6; see also Thatsaphone v. Weber, 137 F.3d 1041, 1045-46 (11th Cir. 1998) (district court "went beyond its habeas authority" when it held an evidentiary hearing "'to develop the factual record'" where petitioner did not show cause for failing to develop factual record in state court).

Maxwell never attempted to meet this standard, nor did the panel decision find that Maxwell met the requirements for an evidentiary hearing in the District Court. In fact, Maxwell never asked the District Court for an evidentiary hearing. (SER at 1-45.) Yet on appeal, he filed numerous "excerpts" with this Court that were never presented to the District Court, and, more troubling, that were never presented to the state court. See Excerpts G, H, I, J, K, L, M, & N; Maxwell's Supplemental Excepts B, E. Thus, by ordering an evidentiary hearing to perform a "more complete inquiry," the panel decision impliedly considered Maxwell's inappropriate excerpts and ignored the presumption of correctness to be afforded the trial court's factual findings. Affording Maxwell an evidentiary hearing on evidence never presented to the state trial court contravenes the Supreme Court's decision in Holland, as well as the dictates of 28 U.S.C. § 2254(e)(2).

C. The Panel Decision Completely Disregards Established Rules of Appellate Practice And The Rules of the Ninth Circuit

The Rules of the Ninth Circuit require appellate litigants to file "excerpts of record" and delineate what shall be included in the excerpts. These rules are designed to prevent litigants from altering the record on appeal from that made in the lower courts. See Ninth Cir. R. 10-2(a) & (b), 30-1.1(a), 30-1.1(a)(xi), 30-2(a)-(d).

In support of his appeal, Maxwell filed excerpts of record never presented to the District Court, many of which were never considered by the trial court in determining Maxwell's competency. Despite never presenting them to the District Court or the state trial court, Maxwell filed in this Court Excerpts K ("Haldol (Haloperidol) as Described in the Physician's Desk Reference"), L ("Mr. Maxwell's Mental Health Records 1) Special Education Records 2) Military Discharge for Mental Unfitness 3) Social Security Disability

Payments" and additional military records added to Excerpt L by counsel on appeal on January 6, 2003), and N ("Declaration of [sic] by Dr. Bruce Hubbard, Psycho-pharmacologist), and Supplemental Excerpts B (a doctor's note dated January 21, 1998), and E (Hospital Medication Records). Although Warden Roe requested the panel strike the inappropriate excerpts, there is no indication in its decision that the Court ruled on Warden Roe's requests to strike and disregard these inappropriate excerpts.[4]

Litigants who do not provide excerpts of record that truly are "excerpts" of the "record," impair this Court's ability to perform its appellate function. Lowry v. Barnhart, 329 F.3d 1019, 1024-25 (9th Cir. 2003); see also Dela Rosa v. Scottsdale Memorial Health Systems, Inc., 136 F.3d 124, 1244 (9th Cir. 1998).

Despite repeated warnings by this Court, Maxwell has flagrantly disregarded the rules of this Court. By failing to

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4. Similarly, Warden Roe notes that the decision fails to address Maxwell's claim that he was involuntary medicated during trial. (Request to Broaden Certification of Issues on Appeal at 4-16), and Warden Roe's assertion that Maxwell was procedurally barred from raising the issue and that there was no evidence lodged in the District Court and considered by the state trial courts that demonstrated Maxwell was forcibly administered any anti-psychotic drugs. (Appellee's Supplemental Brief at 1-29). As such, the decision overlooks material facts, namely Maxwell's submission of still more inappropriate excerpts of record, and has failed to rule on the claim advanced by Maxwell which the California Court of Appeals and the District Court found was procedurally barred. Warden Roe respectfully requests a panel rehearing to resolve the issue and rule on the procedural bar issue. Fed. R. App. P. 35.

strike Maxwell's inappropriate excerpts, it is unclear whether the decision in this case rests solely upon the evidence presented to the District Court and the state trial court. By neglecting to strike the excerpts, the decision in this case suggests to habeas petitioners that if they ignore established appellate procedures and skew an appellate record by inserting documents never considered by lower courts, an appellate court will not be able to distinguish between the true record and that created by an appellate litigant solely to aid in his appeal. En banc review is proper to ensure that such a dangerous precedent is not allowed to strike at the very heart of the appellate processes of this Court. Fed. R. App. P. 35(a)(2).

CONCLUSION

For these reasons, Respondent-Appellee, Warden Ernie Roe, respectfully requests this Court grant a panel rehearing and a rehearing en banc.

Dated: July 27, 2004

Respectfully submitted,

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APPENDIX J

[Filed Aug. 26, 2004]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL,	No. 02-55143
Petitioner - Appellant,	D.C. No. CV-01-00131-VAP(RZ) Central District of California Riverside
v.	
ERNIE ROE, WARDEN,	
Respondent - Appellee.	ORDER

Before: HUG, B. FLETCHER, and WARDLAW, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellee's petition for rehearing. Judge Wardlaw has voted to reject the suggestion for rehearing en banc, and Judge Hug and Judge Fletcher recommend rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX K

[Filed Oct. 22, 2004]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL,	No. 02-55143
Petitioner - Appellant,	D.C. No. CV-01-00131-VAP Central District of California Riverside
v.	
ERNIE ROE, WARDEN,	
Respondent - Appellee.	ORDER

Before: HUG, B. FLETCHER, and WARDLAW, Circuit Judges.

We grant the State's motion to recall the mandate and amend our disposition to clarify the reasons why we hold that a district court hearing is appropriate in this case.

APPENDIX L

[Filed Nov. 4, 2004]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON MAXWELL, Petitioner - Appellant, v. ERNIE ROE, WARDEN, Respondent - Appellee.	No. 02-55143 D.C. No. CV-01-00131-VAP Central District of California Riverside ORDER

Before: HUG, B. FLETCHER, and WARDLAW, Circuit Judges.

The motion of respondent-appellee to stay the mandate is granted. The mandate is stayed for sixty (60) days from the date this order is filed. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

APPENDIX M

[Filed Jan. 19, 2000]

Fourth Appellate District, Division Two, No. E022548
E022548/E023541
S083678
IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

CLIFTON MAXWELL, Appellant
And Companion Case

Petitions for review DENIED.

/s/
Chief Justice

Supreme Court, U.S.
FILED
MAY 6 - 2005
OFFICE OF THE CLERK

No. 04-908

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-908

MICHAEL YARBOROUGH, Warden, Petitioner, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

PETITIONER'S REPLY MEMORANDUM

In his opposing brief, Respondent, Clifton Maxwell, puts forth three reasons why this Court should not grant Petitioner Warden Michael Yarborough's petition for writ of certiorari. None of those reasons have merit.

I.

BECAUSE OF THE IRREPARABLE HARM WHICH WILL ENSUE IF THE DISTRICT COURT IS REQUIRED TO COMPLY WITH THE NINTH CIRCUIT'S REMAND FOR A "FULL EVIDENTIARY HEARING," THE ISSUE PRESENTED IN THIS CASE IS RIPE FOR REVIEW

Respondent asserts that the October 22, 2004, amended decision of the Ninth Circuit in Case No. 02-55143, is not a final judgment and therefore the Ninth Circuit's holding--that a federal habeas corpus petitioner who claims he was incompetent to stand trial in state court and seeks a federal evidentiary

hearing on the competency claim is excused from meeting the requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of such hearings–is not ripe for review. Brief in Opp. at 3. In so doing, Respondent relies on civil cases having no bearing on the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and ignores the fact that without intervention by this Court the district court will be required to initiate pre-hearing proceedings, set discovery and motion dates, determine the parameters of permissible discovery, and hold motion and other in limine hearings, all culminating in a needless "full evidentiary hearing."

"For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, no abstractions,' are requisite." *United Public Workers of America (C.I.O.) et al v. Mitchell, et. al*, 330 U.S. 75, 89 (1947). The question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship on the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967).

The issue in this case is not simply an "abstract disagreement." *Abbott Laboratories*, 387 U.S. at 148. The impact of the Ninth Circuit's remand for a full evidentiary hearing is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152. A contrary finding would (1) permit the Ninth Circuit to circumvent the mandated requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of evidentiary hearings to a federal habeas corpus petitioner, (2) require the district court to hold an evidentiary hearing despite no judicial finding that Respondent has met those strict requirements, and (3) cause direct and immediate harm in the expenditure of scarce and expensive judicial resources in holding an evidentiary hearing in a collateral proceeding attacking a state court judgment. While Respondent suggests that Petitioner could seek review of the issue in this case after an evidentiary

hearing is held (Brief in Opp. at 4), the holding the evidentiary hearing would defeat the very reason certiorari should be granted at this time; to prevent the district court from having to hold such an inappropriate hearing resulting in a legally unsupportable expansion of the trial court record. Review of the issue at that later time would countenance the harm wrought by the Ninth Circuit's amended decision and is contrary to the well-established principles of ripeness and justiciability.

II.

IF RESPONDENT DEVELOPED THE RECORD IN THE TRIAL COURT, THEN THE REPORTER'S AND CLERK'S TRANSCRIPT OF THE STATE TRIAL COURT PROCEEDING EVINCE THAT RECORD; A FULL EVIDENTIARY HEARING IS NOT PERMITTED TO ENLARGE THAT RECORD WITH EVIDENCE THAT WAS NOT CONSIDERED BY THE TRIAL COURT

Respondent further opposes a grant of certiorari, arguing that he "did develop a record in the trial court and that court made certain factual findings and conclusions regarding the competency issue." Brief in Opp. at 5. He maintains the Ninth Circuit's remand to the district court for an evidentiary hearing merely seeks to clarify what evidence was before the trial court. "Otherwise, it would be impossible for the district court, or any other court [to] conduct an informed review of the trial court's decision." Brief in Opp. at 6.

First, if Respondent developed the record in the trial court, then the record is as it appears in the reporter's and clerk's transcripts of the trial court proceedings. The Ninth Circuit's decision, however, does not merely seek clarification of the existing record; it orders the district court to consider both "the facts established in the record and the facts a 'more complete inquiry' by the trial court could have revealed," and "to consider

the reasonableness of the trial court's determination that Maxwell was competent to stand trial in light of those facts." Pet. for Certiorari, Appendix A at 3a, 6a, emphasis added.

Second, that record is not unclear: the California Court of Appeal, the California Supreme Court, and the United States District Court for the Central District of California all were able to conduct an "informed review of the trial court's decision" based on the record as contained in the reporter's and clerk's transcripts of the trial court proceedings. The district court was able to apply the presumption of correctness to the factual findings of the state trial court in conducting its deferential analysis under AEDPA. If during the trial court proceedings Respondent introduced evidence to establish his incompetency to stand trial that was not made part of the record, or if he was precluded from introducing such evidence, Respondent should have sought the inclusion of such evidence at the time of trial or alleged in state and federal habeas corpus proceedings that trial defense counsel was constitutionally ineffective in failing to do so. *See Koste v. Dormire,* 345 F.3d 974, 985-86 (8th Cir. 2003) (habeas petitioner not entitled to evidentiary hearing on claim that trial counsel was ineffective in failing to request psychiatric evaluation of petitioner; any inadequacy in state court record was largely attributable to petitioner). Throughout direct review of his conviction in state court, and collateral habeas corpus review in state and federal courts, Respondent has continuously declined to do so, thus precluding Petitioner and every court that has considered Respondent's incompetency claim from hearing relevant evidence from defense counsel who "will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California,* 505 U.S. 437, 450 (1992). Under these circumstances, the effect of the Ninth Circuit's decision is to permit Respondent to inappropriately expand the record that was before the trial court when the trial court determined Respondent was competent to stand trial, while disregarding trial defense counsel's repeated

proclamations that he was not requesting a competency hearing and had no doubt that Respondent was competent to stand trial (1 RT 80-81; 5 RT 840), and without requiring Respondent to meet the strict evidentiary hearing requirements set forth in 28 U.S.C. § 2254(e)(2)(A).

III.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE NINTH CIRCUIT FROM ISSUING UNPUBLISHED DECISIONS AS A MEANS TO CONTINUE AVOIDING THE RULINGS OF THIS COURT AND THE REQUIREMENTS OF AEDPA

Lastly, Respondent suggests this Court should not grant certiorari in this case because the Ninth Circuit's decision is unpublished, and thus has not created a conflict amongst the circuits. Brief in Opp. at 7. Unless certiorari is granted, the unpublished nature of the Ninth Circuit's amended decision will permit the Ninth Circuit to create with impunity a categorical exception to the evidentiary hearing requirements of 28 U.S.C. § 2254(e)(2)(A) for federal habeas petitioners who claim they were incompetent to stand trial, in direct conflict with the mandates of AEDPA as well as the decisions of this Court.

The Ninth Circuit's attempt to carve out an exception to the evidentiary hearing requirements of AEDPA by announcing the exception in an unpublished amended decision should not be condoned. Regardless of the unpublished nature of the amended decision, it will cause irreparable harm to the State in defending its state court judgments by permitting the Ninth Circuit to carve out its own exceptions affording needless evidentiary hearings, thus depriving the state court factual findings the presumption of correctness and the resulting judgments the deference to which they are entitled. 28 U.S.C. § 2254(d) & (e)(1). This Court should not permit the Ninth Circuit's amended decision to create a conflict with other

circuits which have required adherence to 28 U.S.C. § 2254(e)(2)(A)'s evidentiary hearing requirements when confronted with requests for evidentiary hearings on competency to stand trial claims. *See, i.e., Roberts v. Dretke,* 381 F.3d 491, 494 (5th Cir. 2004); *Valdez v. Ward,* 219 F.3d 1222, 1229, 1239-40 (10th Cir. 2000); *see also Koste v. Dormire,* 345 F.3d at 985-86.

This Court's supervisory power is again needed because of the Ninth Circuit's failure to adhere to AEDPA's strict limitations on the scope of its collateral review of state court constitutional adjudications. *See* Sup. Ct. R.10(a); *see also Middleton v. McNeil*, 541 U.S. 433, 437-39 (2004) (*per curiam*), *rev'g* 344 F.3d 988 (9th Cir. 2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. 19, 26-27 (2002) (*per curiam*), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*) *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 2002).

CONCLUSION

For these reasons, Petitioner, Warden Michael Yarborough, respectfully requests a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated: May 5, 2005

Respectfully submitted,

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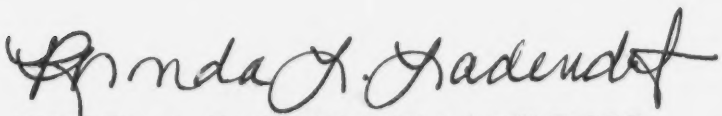

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